DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-547
Title: Linda Metrish, Warden, Petitioner
v.
Burt Lancaster

Docketed: November 2, 2012
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (10-2112)
Decision Date: June 29, 2012
Rehearing Denied: August 27, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 31 2012	Petition for a writ of certiorari filed. (Response due December 3, 2012)
Nov 27 2012	Order extending time to file response to petition to and including January 2, 2013.
Dec 3 2012	Brief amici curiae of Indiana, et al. filed.
Dec 28 2012	Brief of respondent Burt Lancaster in opposition filed. (Distributed)
Jan 2 2013	DISTRIBUTED for Conference of January 18, 2013.
Jan 18 2013	Petition GRANTED.
Feb 11 2013	SET FOR ARGUMENT ON Wednesday, April 24, 2013
Feb 22 2013	Record from U.S.C.A. for 6th Circuit is electronic.
Mar 1 2013	Brief amicus curiae of Wayne County, Michigan filed. (Distributed)
Mar 4 2013	Joint appendix filed. (Distributed) (Statement of costs filed)
Mar 4 2013	Brief of petitioner Linda Metrish, Warden filed. (Distributed)
Mar 8 2013	CIRULATED
Mar 11 2013	Brief amici curiae of Indiana, et al. filed. (Distributed)
Mar 20 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Apr 3 2013	Brief of respondent Burt Lancaster filed. (Distributed)
Apr 5 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Apr 10 2013	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Apr 17 2013	Reply of petitioner Linda Metrish, Warden filed. (Distributed)
Apr 24 2013	Argued. For petitioner: John J. Bursch, Michigan Solicitor General, Lansing, Mich. For respondent: Kenneth M. Mogill, Lake Orion, Mich.

May 20 2013 Judgment REVERSED. Ginsburg, J., delivered the opinion for a unanimous Court

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
OCT 31 2012
OFFICE OF THE CLERK

No. 12-547

In the Supreme Court of the United States

LINDA METRISH, WARDEN, PETITIONER

v.

BURT LANCASTER

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Michigan Supreme Court's recognition that a state statute abolished the long-maligned diminished-capacity defense was an "unexpected and indefensible" change in a common-law doctrine of criminal law under this Court's retroactivity jurisprudence. See *Rogers* v. *Tennessee*, 532 U.S. 451 (2001).

2. Whether the Michigan Court of Appeals' retroactive application of the Michigan Supreme Court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" so as to justify habeas relief. *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011).

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Linda Metrish, Warden of a Michigan correctional facility. The Respondent is Burt Lancaster, an inmate.

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JURISDICTION

The Sixth Circuit Court of Appeals judgment was entered on June 29, 2012. App. 36a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 104, 110 Stat. 1214. 1219 (codified at 28 U.S.C. § 2241 *et seq.*), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

This is yet another appeal of a Sixth Circuit decision granting habeas relief in derogation of this Court's decisions and in violation of the lofty standard for habeas relief that Congress established in the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA).[1]

Respondent Burt Lancaster shot and killed his girlfriend in a restaurant parking lot in 1993. A jury rejected Lancaster's insanity and diminished-capacity defenses and convicted him of first-degree murder. But the conviction was vacated due to a *Batson* violation.

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[1] See *Howes* v. *Walker*, 132 S. Ct. 2741 (2012) (vacating and remanding *Walker* v. *McQuiggan*, 656 F.3d 311 (6th Cir. 2011)); *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012) (reversing *Matthews* v. *Parker*, 651 F.3d 489, 507 (6th Cir. 2011)); *Lovell* v. *Duffey*, 132 S. Ct. 1790 (2012) (vacating and remanding *Lovell* v. *Duffey*, 629 F.3d 587, 596 (6th Cir. 2011)); *Sheets* v. *Simpson*, 132 S. Ct. 1632 (2012) (vacating and remanding *Simpson* v. *Jackson*, 615 F.3d 421 (6th Cir. 2010)); *Howes* v. *Fields*, 132 S. Ct. 1181 (2012) (reversing *Fields* v. *Howes*, 617 F.3d 813, 823 (6th Cir. 2010)); *Stovall* v. *Miller*, 132 S. Ct. 573 (2011) (vacating and remanding *Miller* v. *Stovall*, 608 F.3d 913 (6th Cir. 2010)); *Bobby* v. *Mitts*, 131 S. Ct. 1762 (2011) (reversing *Mitts* v. *Bagley*, 620 F.3d 650 (6th Cir. 2010)); *Bobby* v. *Dixon*, 132 S. Ct. 26 (2011) (reversing *Dixon* v. *Houk*, 627 F.3d 553, 560 (6th Cir. 2010)); *Renico* v. *Lett*, 130 S. Ct. 1855 (2010) (reversing *Lett* v. *Renico*, 316 F. App'x 421 (6th Cir. 2009)); *Berghuis* v. *Smith*, 130 S. Ct. 1382 (2010) (reversing in *Smith* v. *Berghuis*, 543 F.3d 326, 340 (6th Cir. 2008)); *Smith* v. *Spisak*, 130 S. Ct. 676 (2010) (reversing *Spisak* v. *Hudson*, 512 F.3d 852 (6th Cir. 2008)); and *Berghuis* v. *Thompkins*, 130 S. Ct. 2250 (2010) (reversing *Thompkins* v. *Berghuis*, 547 F.3d 572, 584 (6th Cir. 2008)). See also *McQuiggan* v. *Perkins*, ___ S. Ct. ___ (Oct. 29, 2012) (granting Michigan's petition for certiorari).

Between Lancaster's first and second trial, the Michigan Supreme Court held that diminished capacity was not a valid defense to a crime. *People* v. *Carpenter*, 627 N.W.2d 276 (Mich. 2001). Accordingly, the trial court prohibited Lancaster from asserting the defense at his second trial, and he was again convicted of murder. The Michigan Court of Appeals rejected Lancaster's due-process claim, holding that under well-settled Michigan law of retroactivity, *Carpenter* was neither unforeseeable nor even a change in state law. The District Court below denied habeas relief.

Over Chief Judge Batchelder's dissent, a Sixth Circuit panel majority reversed and granted habeas relief, ordering a retrial so Lancaster could (again) raise a diminished-capacity defense. In so holding, the panel majority erred in two ways.

First, the Sixth Circuit misapplied this Court's decisions in *Rogers* v. *Tennessee*, 532 U.S. 451 (2001), and *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). Under those precedents, retroactive application of a state-court decision altering the common law violates due process only where the decision is unexpected and indefensible. But the diminished-capacity defense was not well-established in Michigan law, and its elimination was entirely foreseeable, as both the District Court and Chief Judge Batchelder recognized.

Second, under AEDPA, the Michigan Court of Appeals' decision to apply *Carpenter* retroactively did not constitute an error so "well understood and comprehended in existing law" that it was "beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011). The petition should be granted.

STATEMENT OF THE CASE

A. Toni King's murder

In 1993, Burt Lancaster, a former Detroit police officer, spent several hours talking with his mother. Lancaster told his mother that his girlfriend, Toni King, had lied to him, hurt him, and she needed to die. Lancaster asked his mother if he could have a gun. She refused to give him one, so Lancaster broke into his mother's hallway closet, stole a gun, and fled. Lancaster also disabled his mother's phone, forcing her to run to the neighbor's home to call the police.

Soon after Lancaster left his mother's home, King drove to a restaurant with her co-worker, Julie Garner. Garner noticed that Lancaster was following them in his vehicle. After arriving at the restaurant, Garner began to walk to the restaurant leaving Lancaster (who remained in his vehicle) and King to talk. Garner heard King say something, turned around, and saw Lancaster shoot King at point-blank range. King died.

B. Lancaster's 1994 trial

At his first trial, Lancaster asserted the defenses of insanity and diminished capacity. The jury rejected both defenses and found Lancaster guilty as charged.

After failing to obtain relief on his direct appeal in state court, Lancaster filed a petition for habeas relief in federal court. The District Court granted Lancaster habeas relief, concluding that the State had committed an error during jury selection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The Sixth Circuit affirmed. *Lancaster* v. *Adams*, 324 F.3d 423 (6th Cir. 2003).

C. Lancaster's 2005 trial

The State retried Lancaster in 2005. But before trial, the court ruled that Lancaster could not present a diminished-capacity defense because the Michigan Supreme Court's intervening decision in *Carpenter* confirmed that the defense was not available in Michigan. Following a bench trial, the state trial court again found Lancaster guilty of first-degree murder.

On direct appeal, the Michigan Court of Appeals held that the trial court did not violate Lancaster's due-process rights. That is because, under well-established Michigan law, the Michigan Supreme Court's first interpretation of an unambiguous statute (here, the 1975 enactment) is not a change in law for purposes of due-process challenges. App. 77a. (citing *People* v. *Doyle*, 545 N.W.2d 627, 636 (Mich. 1996)).

D. Federal habeas corpus proceedings

The District Court denied Lancaster relief because the *Carpenter* decision was a foreseeable application of Michigan law. The Michigan Supreme Court "never specifically authorized [the defense's] use in the Michigan courts," the defense had "never been codified by the legislature," and the theory "never enjoyed a solid foothold in Michigan's law." App. 49a–50a. Moreover, the District Court recognized that the circumstances here were strikingly similar to those in *Rogers*, in which this Court upheld a murder conviction despite the Tennessee Supreme Court's intervening decision abolishing a common-law defense that would have otherwise been available to the murderer. App. 50a.

The Sixth Circuit panel majority reversed. The majority determined that this case overcame AEDPA's stringent standard because the Michigan Court of Appeals unreasonably applied this Court's decisions in *Rogers* and *Bouie*. App. 26a–27a. The majority said that the Michigan Court of Appeals disregarded its own prior cases suggesting that a diminished-capacity defense might be available in Michigan, as well as the Michigan court rule that says published Michigan Court of Appeals opinions are binding on lower courts until reversed by the Michigan Supreme Court. App. 27a.

Sixth Circuit Chief Judge Batchelder dissented, concluding that the Michigan Court of Appeals' decision was reasonable under *Rogers* and *Bouie* because the diminished-capacity defense was not well-established in Michigan and the Michigan Supreme Court's decision in *Carpenter* was foreseeable. App. 29a–35a. Since the Michigan Court of Appeals' conclusion was "consistent with *Rogers* and *Bouie*" in Chief Judge Batchelder's view, the decision "was not 'so lacking in justification' as to entitle Lancaster to habeas relief." App. 31a (quoting *Harrington*, 131 S. Ct. at 786–87).

REASONS FOR GRANTING THE PETITION

The petition should be granted to reiterate this Court's repeated admonitions to the Sixth Circuit regarding the deference owed to state-court determinations under AEDPA.

In *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012), this Court reversed a Sixth Circuit grant of habeas and described that grant as "a textbook example of what [AEDPA] proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.'" *Id.* at 2149 (quoting *Renico* v. *Lett*, 130 S. Ct. 1855, 1866 (2010)). Accord *Howes* v. *Walker*, 132 S. Ct. 2741 (2012) (granting Michigan's petition and summarily vacating Sixth Circuit habeas grant for further consideration in light of *Matthews*). Regrettably, the Sixth Circuit's grant of habeas relief in this case demonstrates that the panel majority is still using the same textbook.

A. The Michigan Court of Appeals' decision is wholly consistent with this Court's rulings in *Rogers* and *Bouie*.

This Court held in *Rogers* and *Bouie* that retroactive application of a state-court decision abolishing an affirmative defense will violate federal due process *only* if the decision unexpectedly or indefensibly abrogated a consistent line of decisions recognizing the defense. The paramount questions under this standard focus on notice, foreseeability, and fair warning. *Rogers*, 532 U.S. at 462; *Bouie*, 378 U.S. at 458–59. Accordingly, a brief history of the diminished-capacity defense both nationally and in

Michigan is essential to determining if the Michigan Court of Appeals' decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1).

In 1949, California became the first state to acknowledge the diminished-capacity defense. *People* v. *Wells*, 202 P.2d 53 (Cal. 1949). The defense allows a legally sane defendant to argue that diminished capacity vitiated the intent element of his crime.

A panel of the Michigan Court of Appeals first suggested the defense of diminished capacity in 1973. *People* v. *Lynch*, 208 N.W.2d 656 (Mich. App. 1973). But in 1975, the Michigan Legislature enacted a comprehensive statutory framework for determining when a person's mental incapacity could relieve him of criminal responsibility for an act. And the State Legislature made no reference to any mental condition other than insanity in this comprehensive statutory framework. When the State Legislature amended its statutory framework for mental capacity defenses in 1994, it once again made no reference to diminished capacity.

The Michigan Supreme Court interpreted this comprehensive statutory framework in the context of a claimed diminished-capacity defense for the first time in its 2001 *Carpenter* decision. It determined that the Michigan Legislature "demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." 208 N.W.2d at 283. Thus, while a handful of Michigan Court of Appeals and Michigan Supreme Court cases hinted

over the years that the diminished-capacity defense *might* exist, there was no certainty, and it was eminently foreseeable that the Michigan courts could extinguish the doctrine altogether at any time.

On a national level, the beginning of the end for the diminished-capacity defense can be traced to the uproar that followed a California jury's use of the defense to convict a defendant of manslaughter for the killing of two individuals in San Francisco. The defendant in that case argued that a chemical imbalance caused by consuming too much "junk food" (including most famously "Twinkies") exacerbated his pre-existing mental difficulties. *People* v. *White*, 172 Cal. Rptr. 612 (Cal. Ct. App. 1981). The public outcry that followed led the California State Legislature to abolish the diminished-capacity defense by statute. *In re Christian S.*, 872 P.2d 574, 575 (Cal. 1994).

Consequently, as Chief Judge Batchelder noted in dissent here, the defense of diminished capacity had been diminishing in state jurisprudence, long before Lancaster's trials. Some state legislatures wrote the defense out of their state laws, while in other jurisdictions, the state courts held that their case law did not support such a defense. App. 33a, n.1 (Batchelder, C.J., dissenting) (citing Cal. Penal Code § 25(a); *Mincey* v. *Head*, 206 F.3d 1106, 1139 (11th Cir. 2000); *Barnett* v. *Alabama*, 540 So. 2d 810, 812 (Ala. Crim. App. 1988); *Arizona* v. *Laffoon*, 610 P.2d 1045, 1047 (Ariz. 1980); *O'Brien* v. *United States*, 962 A.2d 282, 300–01 (D.C. 2008); *Hodges* v. *Florida*, 885 So. 2d 338, 352 n.8 (Fla. 2003); *Hawaii* v. *Klafta*, 831 P.2d 512 (Haw. 1992); *Cardine* v. *Indiana*, 475 N.E.2d 696, 698 (Ind. 1985); *Iowa* v. *Plowman*, 386 N.W.2d 546, 548

(Iowa Ct. App. 1986); *Kansas* v. *Pennington*, 132 P.3d 902, 908 (Kan. 2006); *Louisiana* v. *Thompson*, 665 So. 2d 643, 647 (La. Ct. App. 1995); *Maryland* v. *Greco*, 24 A.3d 135, 144 (Md. Ct. Spec. App. 2011); *Massachusetts* v. *Finstein*, 687 N.E.2d 638, 640 (Mass. 1997); *Cuypers* v. *Minnesota*, 711 N.W.2d 100, 105 (Minn. 2006); *Stevens* v. *Mississippi*, 806 So. 2d 1031, 1051 (Miss. 2001); *North Carolina* v. *Adams*, 354 S.E.2d 338, 343 (N.C. Ct. App. 1987); *Ohio* v. *Wilcox*, 436 N.E.2d 523, 533 (Ohio 1981); *South Carolina* v. *Santiago*, 634 S.E.2d 23, 28 (S.C. Ct. App. 2006); *Tennessee* v. *Gosse*, 982 S.W.2d 349, 353 (Tenn. Crim. App. 1997); *Davis* v. *Texas*, 313 S.W.3d 317, 328 (Tex. Crim. App. 2010); *Keats* v. *Wyoming*, 115 P.3d 1110, 1119 (Wyo. 2005)).

In light of the diminished-capacity defense's national disfavor, this Court's decision in *Rogers* is directly on point. In *Rogers*, the Tennessee Supreme Court abolished the common-law rule that the death of a victim within a year and a day after being assaulted is a prerequisite to a homicide prosecution. The state court applied that abolition when it upheld a murder conviction where the victim's death was fifteen months after the assault. On direct review, this Court upheld the conviction, holding that the Tennessee Supreme Court's retroactive abolition of the "year and a day" rule did not violate due process. The Court reasoned that abolition of the "year and a day" rule was not unexpected or indefensible because it was based on an "outdated relic of the common law." *Rogers*, 532 U.S. at 462. In fact, the doctrine was so outdated that advances in medical science undermined its usefulness and rendered it obsolete. *Rogers*, 532 U.S. at 463. And because the rule at issue was a common-law rule, the Court rejected the defendant's argument that "the

judicial abolition of the rule in other jurisdictions [was] irrelevant to whether he had fair warning that the rule in Tennessee might similarly be abolished": as the Court recognized, "the fact that a vast number of [other] jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed." *Rogers*, 532 U.S. at 463–64. Because the state court's abolition of the year-and-a-day rule was foreseeable, Rogers' due process rights were protected.

The present circumstances are on all fours with *Rogers*. In *Carpenter*, the Michigan Supreme Court similarly abolished a principle of common law, although it did so by recognizing the doctrine's statutory abrogation in the 1975 framework for determining when mental capacity is available as an affirmative defense to a crime. Just like the year-and-a-day rule, the diminished-capacity defense never existed in Michigan's statutory criminal codes; to the contrary, the defense was affirmatively excluded by the comprehensive redrafting of Michigan statutory law in 1975. Moreover, the diminished-capacity defense had been the subject of much debate across the country and, as a result, had been abandoned in many jurisdictions, just like the common-law rule at issue in *Rogers*. And the doctrine never once served as a ground of a decision in any Michigan murder case. App. 51a. Accord *Rogers*, 532 U.S. at 467. Given all the circumstances, the rule's demise was foreseeable.

The Sixth Circuit panel majority believed that the Michigan Court of Appeals (and the District Court and Chief Judge Batchelder) "materially understated" the degree to which the diminished-capacity defense had become established in Michigan jurisprudence. App. 8a. The majority felt that the Michigan Court of Appeals (and the District Court and Chief Judge Batchelder) "failed to recognize the plethora of state appellate court cases recognizing the validity of the defense." App. 8a. But the Michigan Court of Appeals looked at those very same precedents and came to the exact opposite conclusion, and the District Court and Chief Judge Batchelder did not view that conclusion as objectively unreasonable.

In light of the similarities with this Court's decision in *Rogers*, the Michigan Court of Appeals reached the reasonable conclusion that *Carpenter* was not a change in the law because the diminished-capacity defense was *not* well-established and its elimination was foreseeable. As Chief Judge Batchelder noted, "neither the Michigan legislature nor the Michigan courts gave diminished capacity standing as a separate defense," App. 32a, and "the fact that a vast number of jurisdictions have abolished a rule that so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed," App. 34a (Batchelder, C.J., dissenting) (quoting *Rogers*, 532 U.S. at 464).

B. The Michigan Court of Appeals' decision in this case was reasonable under AEDPA.

This Court has been forced to reemphasize, repeatedly, the high level of deference owed to state court decisions on federal habeas review. "A state prisoner [seeking habeas relief] must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 786–87. For three reasons, there are no such circumstances here.

To begin, the Michigan Court of Appeals ultimately rejected Lancaster's position because it concluded, correctly, that *Carpenter* did not represent a change in state law. It is well established in Michigan that the Michigan Supreme Court's first interpretation of an unambiguous statute (here, the 1975 enactment) is not a change in law for purposes of due-process challenges. App. 77a (citation omitted). When a state court says that state law has not changed, it is the rare case when it will be proper for a federal court to conclude otherwise, given that state courts understand the development of state law better than federal courts do. E.g., *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Envt'l Protection*, 130 S. Ct. 2592, 2612 (2010) (Scalia, J., plurality opinion) (noting that the "result under Florida law may seem counter-intuitive," but nonetheless deferring to Florida precedent). And it should be rarer still that a state-court ruling of this sort should be deemed objectively unreasonable.

In addition, it is difficult to find an error "beyond any possibility for fairminded disagreement" in a case where a trial court judge reached a legal conclusion, a three-judge panel of a state intermediate appeals court affirmed, seven state supreme court justices saw no error sufficient to warrant further review, a federal district judge declined to set aside the result under habeas review, and a chief judge of a federal circuit agreed with the district court. Indeed, of the 15 state and federal judges who have looked at this case, it was only the two members of the Sixth Circuit panel majority who concluded that there was a constitutional problem. And in their opinion, the other 13 judges are not only incorrect but came to a conclusion no fairminded jurist could have ever reached.

Finally, the Michigan Court of Appeals' decision was not an unreasonable application of this Court's decision in *Rogers*. Unlike *Rogers*, *Carpenter* was not a case where a state supreme court overruled one hundred years of its own precedent. Instead, the Michigan Supreme Court addressed—for the first time—whether diminished capacity was a viable defense in light of the 1975 and 1994 statutory schemes. And in answering "no," the Michigan Supreme Court followed the general trend that many other states have followed over the past several decades. Accordingly, the Michigan Court of Appeals' decision to apply *Carpenter* retroactively was not an unreasonable application of *Rogers*.

To prevail on his due-process claim, Lancaster must also demonstrate that he reasonably relied on Michigan's pre-*Carpenter* law, such that the change in law constituted an "[un]fair warning." App. 6a (quoting

Rogers, 532 U.S. at 457). But it is nonsensical to say that Lancaster relied on the diminished-capacity defense's availability when he killed Toni King. As the Third and Seventh Circuits have said, "it would border on the absurd" to argue that a person would refrain from committing crimes or conduct his trial differently if he had known that a course of action would no longer be available to him. *Pannapula* v. *Ashcroft*, 373 F.3d 480, 495–96 n.14 (3d Cir. 2004) (quoting *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)).

And Lancaster has not suggested that he acted in reliance on diminished capacity as a potential defense when he killed Toni King. Nor could he. *Lara-Ruiz* v. *I.N.S.*, 241 F.3d 934, 945 n.8 (7th Cir. 2001); *People* v. *Doyle*, 545 N.W.2d 627, 634 (Mich. 1996) ("[I]t cannot be seriously maintained that drunk drivers, such a Mr. Doyle, were relying on the rule of [*People* v.] *Tucker*, [441 N.W.2d 59 (Mich. App. 1989)] in conducting their behavior. No person would decide to drive drunk for a third time, because . . . such conduct would be a felony that could result in a five-year prison sentence, but not a prison sentence of seven and a half years. . . . [D]efendant's reliance argument [is] absurd."). Indeed, it would seem especially difficult to assert reliance on a little-known law while at the same time claiming diminished mental capacity.

In sum, the Michigan Court of Appeals' decision—that *Carpenter*'s application did not implicate due process concerns in Lancaster's case—was not an objectively unreasonable application of this Court's precedent under AEDPA. The Sixth Circuit's contrary decision will result in a waste of valuable prosecutorial and judicial resources and amounts to nothing less

than second-guessing of the Michigan state courts. The outcome is exactly what Congress sought to prevent in adopting AEDPA. Certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: OCTOBER 2012

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BURT LANCASTER,
Petitioner-Appellant,
v.
LINDA METRISH, MICHIGAN DEPARTMENT OF CORRECTIONS, and PATRICIA L. CARUSO, Director,
Respondents-Appellees.
No. 10-2112

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:07-cv-13692—Avern Cohn, District Judge.

Decided and Filed: June 29, 2012

Before: BATCHELDER, Chief Judge; CLAY and GILMAN, Circuit Judges.

COUNSEL

ON BRIEF: Kenneth M. Mogill, MOGILL, POSNER & COHEN, Lake Orion, Michigan, for Appellant. Laura

Moody, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellees.

GILMAN, J., delivered the opinion of the court, in which CLAY, J., joined. BATCHELDER, C. J. (pp. 21–25), delivered a separate dissenting opinion.

OPINION

RONALD LEE GILMAN, Circuit Judge. Burt Lancaster appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. In 1993, Lancaster was charged by the state of Michigan with first-degree murder and with possession of a firearm in the commission of a felony. At his 1994 jury trial, he was convicted on both counts despite his asserted defenses of insanity and diminished capacity. The judgment was later overturned, however, due to an error by the State during jury selection (a *Batson* violation).

When Lancaster was retried in 2005, he opted to be tried without a jury. Lancaster had planned to limit his defense in the second trial to that of diminished capacity. But the trial court prohibited Lancaster from asserting the defense because, in the interim between his two trials. the Michigan Supreme Court had abolished the diminished-capacity defense in the case of *People v. Carpenter*, 627 N.W.2d 276 (Mich. 2001). Lancaster was once again convicted and sentenced to life plus an additional two years in prison.

In his petition for a writ of habeas corpus, Lancaster claims that his right to due process was

violated by the state court's retroactive application of *Carpenter*. The district court denied his petition. For the reasons set forth below, we **REVERSE** the decision of the district court and **GRANT** Lancaster's petition for a writ of habeas corpus unless the State commences a new trial within 180 days of this Opinion in which Lancaster is permitted to assert the defense of diminished capacity.

I. BACKGROUND

On April 23, 1993, Lancaster, a former Detroit police officer with a long history of mental illness, shot and killed his girlfriend, Toni King, in the parking lot of a shopping plaza in Southfield, Michigan. He was charged with first-degree murder, in violation of M.C.L. § 750.316, and with possessing a firearm in the commission of a felony, in violation of M.C.L. § 750.227. At his 1994 jury trial in state court, Lancaster admitted that he had killed his girlfriend, but asserted the defenses of insanity and diminished capacity. The jury rejected these defenses and convicted him on both counts.

After exhausting his appeals in state court, Lancaster filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. He raised several claims, including a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), in which he contended that the State had used one of its peremptory challenges to improperly exclude an African-American juror based on the juror's race. The district court conditionally granted the writ on the basis of Lancaster's *Batson* claim. This court affirmed. *Lancaster v. Adams*, 324 F.3d 423, 427 (6th Cir. 2003).

Lancaster was retried in state court in 2005 on the same charges. This time, he waived his right to a jury trial. He also limited his defense to that of diminished capacity, abandoning his alternative defense of insanity. The diminished-capacity defense

> allows a defendant, even though legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime. The theory is that if because of mental disease or defect a defendant cannot form the specific state of mind required as an essential element of a crime, he may be convicted only of a lower grade of the offense not requiring that particular mental element.

Carpenter, 627 N.W.2d at 280 (brackets, citation, and internal quotation marks omitted).

In *Carpenter*, however, the Michigan Supreme Court held that diminished capacity was no longer a valid defense under Michigan law as a result of the 1975 enactment by the state legislature of a statutory framework for the insanity defense. *Id.* at 285. The Michigan trial court in Lancaster's case decided that *Carpenter* applied retroactively, thus prohibiting Lancaster from asserting the diminished-capacity defense at his second trial. Lancaster sought an interlocutory appeal from the trial court's order that precluded him from pursuing the defense of diminished capacity. But both the Michigan Court of Appeals and the Michigan Supreme Court declined to consider the merits of the appeal. Lancaster was subsequently convicted on both charges at the conclusion of the bench trial. He was sentenced to life imprisonment for the murder conviction, to be served consecutively to

two years' imprisonment for the felony-firearm conviction.

After exhausting his state-court remedies, Lancaster filed a § 2254 habeas petition in the district court. In his petition, he argues that the Michigan Supreme Court's abolition of the diminished-capacity defense was a substantive change in state law and that, by applying the change retroactively, the trial court violated his right to due process under the Fifth and Fourteenth Amendments to the U.S. Constitution. The district court denied Lancaster's petition, reasoning that the abolition of the diminished-capacity defense was foreseeable because the defense was not well-established in Michigan law. It then granted a certificate of appealability on the issue, and this timely appeal followed.

II. ANALYSIS

A. Standard of review

"We review the district court's legal conclusions in a habeas proceeding de novo and its factual findings under the clear-error standard." *Davis v. Lafler*, 658 F.3d 525, 530 (6th Cir. 2011). "Because the Petition [in this case] was filed after April 24, 1996, the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 ('AEDPA'), our review of the decisions of the state trial and appellate courts is governed by AEDPA." *Lancaster v. Adams*, 324 F.3d 423, 428 (6th Cir. 2003).

AEDPA provides in pertinent part that

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

28 U.S.C. § 2254(d)(1). "A state court decision may be an 'unreasonable application' of clearly established Supreme Court precedent 'if the state court identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case' or 'if the state court . . . unreasonably refuses to extend that principle to a new context where it should apply.'" *Lancaster*, 324 F.3d at 429 (alterations omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 407 (2000)).

B. The retroactive application of *Carpenter* violated Lancaster's right to due process

Lancaster claims that his right to due process was violated by the state trial court's retroactive application of the Michigan Supreme Court's 2001 decision in *Carpenter*. The United States Supreme Court "has often recognized the basic [due process] principle that a criminal statute must give fair warning of the conduct that it makes a crime." *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) (internal quotation marks omitted). This "federal right turns

upon . . . the appearance to the individual of the status of state law as of that moment [when the crime was allegedly committed]." *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (internal quotation marks omitted).

"[A] judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Rogers*, 532 U.S. at 462 (quoting *Bouie*, 378 U.S. at 354). Put another way, "[w]hen a state court overrules a consistent line" of decisions interpreting a criminal statute or common law and applies that decision "retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law." *Bouie*, 378 U.S. at 354-55. This tenet of due process is the judicial counterpart to the Ex Post Facto Clause found in Article I of the U.S. Constitution, which applies only to legislatures. *Rogers*, 532 U.S. at 456 ("[L]imitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process."). "Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, s[.] 10, of the Constitution forbids." *Bouie*, 378 U.S. at 353.

Here, Lancaster was deprived of the defense of diminished capacity by the retroactive application of *Carpenter*. The Ex Post Facto Clause prohibits a state legislature from making certain changes in criminal statutes retroactive, including changes that "deprive[] one charged with crime of any defense available

according to law at the time when the act was committed." *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (internal quotation marks omitted). Because in this case the Michigan Supreme Court, not the state legislature, eliminated the defense of diminished capacity, Lancaster must show that the Court's abolition of the defense was unforeseeable in order to succeed on his due process claim. *See Bouie*, 378 U.S. at 353-54. That is, he must demonstrate that *Carpenter* unexpectedly abrogated a consistent line of decisions recognizing the defense.

The district court concluded that the demise of the diminished-capacity defense was foreseeable because

> the Michigan Supreme Court acknowledged in passing the concept of the diminished capacity defense, but it never specifically authorized its use in the Michigan courts. Thus, although diminished capacity has been utilized as a defense since 1973, it has never been codified by the legislature as a viable defense or formally adopted by the state's highest court. As such, the defense has never enjoyed a solid foothold in Michigan's criminal law.

Lancaster v. Metrish, 735 F. Supp. 2d 750, 757 (E.D. Mich. 2010) (citations omitted). But the district court materially understated the "foothold" that the diminished-capacity defense had established in Michigan law and failed to recognize the plethora of state appellate court cases recognizing the validity of the defense.

1. The defense of diminished capacity was well-established under Michigan law prior to Carpenter

a. Michigan Court of Appeals

Diminished capacity was first recognized as a defense in *People v. Lynch*, 208 N.W.2d 656 (Mich. Ct. App. 1973), 28 years before *Carpenter* was decided. The court in *Lynch* held that the trial court erred in prohibiting the defendant charged with first-degree murder from presenting medical evidence "of diminished or partial responsibility." *Id.* at 662; *see also Carpenter*, 627 N.W.2d at 281 (recognizing that *Lynch* "introduced to Michigan the diminished capacity defense" as a "defense separate from legal insanity").

Then, in 1975, the Michigan legislature enacted a statutory framework for the defense of insanity. *See People v. Mangiapane*, 271 N.W.2d 240, 246-49 (Mich. Ct. App. 1978) (holding that 1975 Public Act Nos. 179 and 180 modified the rule established in *Lynch*). One of the newly enacted statutes codified the insanity defense for the first time:

> **768.21a Persons deemed legally insane. [M.S.A. 28.1044(1)]**
>
> Sec. 21a. (1) A person is legally insane if, as a result of mental illness . . . , that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.
>
> (2) A person who is under the influence of voluntarily consumed or injected alcohol or

> controlled substances at the time of his alleged offense shall not thereby be deemed to have been legally insane.

1975 Mich. Pub. Acts 386-87.

Diminished capacity was not specifically addressed in this statute, but in 1978, the Michigan Court of Appeals held "that the defense known as diminished capacity comes within th[e] codified definition of legal insanity" and that, in asserting the diminished-capacity defense, the defendant must follow the same procedures as outlined for the insanity defense in the statute. *Mangiapane*, 271 N.W.2d at 249. Thus, despite the new statutory framework, the court continued to recognize diminished capacity as a legitimate defense. *See People v. Mette*, 621 N.W.2d 713, 719 (Mich. App. Ct. 2000) (observing that "[t]his court has consistently held that the defense of diminished capacity comes within the codified definition of legal insanity and is subject to the same procedural requirements" (collecting cases)).

The Michigan Supreme Court acknowledged this history in *Carpenter*:

> The [Michigan] Court of Appeals['] decision in *Mangiapane* was then followed by a series of decisions continuing to address diminished capacity defense as a form of the statutory insanity defense. *See, e.g., People v. Denton*, 138 Mich. App. 568, 360 N.W.2d 245 (1984); *People v. Anderson*, 166 Mich. App. 455, 421 N.W.2d 200 (1988).

Carpenter, 627 N.W.2d at 282; *see also People v. Lipps*, 421 N.W.2d 586, 589-90 (Mich. App. Ct. 1988) ("Conditions which are recognized as defenses to [a specific intent] crime include intoxication, insanity and diminished capacity"); *People v. Paris*, 420 N.W.2d 184, 186 (Mich. App. Ct. 1988) (holding that the prosecutor does not have general discovery rights because Michigan law requires a defendant "to disclose [only] a defense of insanity or diminished capacity" (citing M.C.L. § 768.20a)); *People v. Kvam*, 408 N.W.2d 71, 74 (Mich. App. Ct. 1987) (explaining that "[t]he diminished capacity defense is merely one aspect of whether a defendant has the requisite intent"); *People v. Jones*, 390 N.W.2d 189, 191 (Mich. App. Ct. 1986) (holding that "once evidence of diminished capacity is introduced by a defendant, the prosecution bears the burden of establishing the defendant's 'normal capacity'"). When Lancaster committed his crimes in 1993, therefore, the Michigan Court of Appeals had consistently upheld the use of the diminished-capacity defense.

Absent from the 1975 statutory framework, however, was any indication of which party had the burden of proof required to demonstrate insanity. *See People v. McRunels*, 603 N.W.2d 95, 98 (Mich. Ct. App. 1999) (remarking that "the [1975] insanity statute made no reference to the burden of proof," so the burden of proof was "governed by common law"). The Michigan Supreme Court thus continued the common-law method of shifting the burden of proof that was established well before the insanity defense was codified. *See People v. Savoie*, 349 N.W.2d 139, 143 (Mich. 1984) (citing cases as early as 1868 for the burden-shifting framework of the insanity defense).

Under this burden-shifting framework, "[a] criminal defendant is presumptively sane. However, once there is any evidence introduced of insanity, the burden of proof is on the prosecution to establish defendant's sanity beyond a reasonable doubt." *Id.* at 143. This caused the Michigan Court of Appeals to hold that the same burden-shifting framework should be applied to both the insanity and diminished-capacity defenses. *See Denton*, 360 N.W.2d at 247 (reasoning that because all other procedures for the two defenses were the same, the allocation of the burden of proof should follow suit).

In 1994, however, the legislature amended the statutory definition of the insanity defense and shifted the burden of proof entirely to the defendant. Insanity was declared an affirmative defense that the defendant must prove "by a preponderance of the evidence." Mich. Comp. Laws § 768.21a(3); *see* 1994 Mich. Pub. Acts 251-52 (containing the 1994 amendments); *see also McRunels*, 603 N.W.2d at 99-100 (holding that the 1994 amendments changed the burden of proof for the defense of insanity). Consistent with its earlier decisions, the Michigan Court of Appeals held in 2000 that the insanity-defense statute as amended continued to apply to the diminished-capacity defense. *Mette*, 621 N.W.2d at 719 (holding that the trial court correctly instructed the jury that the "defendant had to establish by evidence that outweighed the evidence against him that he lacked the capacity to form specific intent"); *see also Carpenter*, 627 N.W.2d at 282 ("[T]he Court of Appeals held that a defendant seeking to present a diminished capacity defense bears the burden of establishing such a defense by a preponderance of the evidence.").

b. Michigan Supreme Court

Unlike the Michigan Court of Appeals, the Michigan Supreme Court never directly addressed the validity of a defense of diminished capacity based on mental illness or disability before *Carpenter*, but the Court conceded in that case that it had "several times acknowledged in passing the concept of the diminished capacity defense." *Id.* at 281. The Court first did so in *People v. Ramsey*, 375 N.W.2d 297 (Mich. 1985).

Ramsey was a consolidated appeal of two defendants who challenged the constitutionality of Michigan's "guilty but mentally ill" verdict. One of the defendants, Ramsey, was convicted of second-degree murder following a bench trial. As an alternative to his constitutional challenge, he argued that by being "guilty but mentally ill," he lacked the requisite intent for second-degree murder as a matter of law. The Court rejected Ramsey's contention with the following explanation:

> "A defendant in a criminal case, at the time he engaged in the conduct giving rise to the charges against him, may have been suffering from an abnormal mental condition which was not of a kind or character to afford him a successful insanity defense . . . . But, while this defendant is therefore ineligible for a finding of not guilty by reason of insanity, his mental abnormality may nonetheless be a most relevant consideration in the determination of whether he is guilty of the crime charged. Under the doctrine referred to as partial responsibility, diminished responsibility, or (somewhat less accurately) partial insanity,

> evidence concerning the defendant's mental condition is admissible on the question of whether the defendant had the mental state which is an element of the offense with which he is charged."
>
> Thus, while his mental illness may be a consideration in evaluating the requisite state of mind for the crime charged, we decline to accept Ramsey's invitation to hold that a finding of mental illness negates malice aforethought as a matter of law.
>
> . . . .
>
> Had the trial judge indicated a refusal to consider the defendant's mental illness as a diminishing factor in his decision of whether defendant possessed the requisite malice aforethought, we would find it necessary to address the question of the extent to which mental illness could diminish the intent requirement for second-degree murder. But he did not.

Id. at 304 (quoting Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 42, at 326 (1972)). The Court thus acknowledged the substantive components of the diminished-capacity defense (albeit under a different name), but left open the questions of whether, and to what degree, the defense would apply to a general-intent crime like second-degree murder. *See also People v. Langworthy*, 331 N.W.2d 171, 180 (Mich. 1982) (holding that, unlike the specific-intent crime of first-degree murder, second-degree murder is a general-

intent crime for which the defense of voluntary intoxication is not available).

A year after *Ramsey*, the Michigan Supreme Court revisited the use of the diminished-capacity defense in *People v. Fernandez*, 398 N.W.2d 311 (Mich. 1986). Fernandez challenged his conviction of conspiracy to commit first-degree murder on the basis that the trial court erred by refusing to instruct the jury on the lesser-included offense of conspiracy to commit second-degree murder. But the Michigan courts had never before determined whether such a charge was recognized under Michigan law. Holding that a conspiracy to commit second-degree murder was a "logical impossibility," the Michigan Court of Appeals affirmed Fernandez's conviction. *People v. Fernandez*, 372 N.W.2d 567, 571 (Mich. App. Ct. 1985). It explained:

> A conspiracy is a combination or agreement with others to do something unlawful. Second-degree murder is an unlawful killing and a purpose to kill without that deliberation and premeditation which characterize murder in the first degree. For a conspiracy conviction to lie, there must be proof of two specific intents: (1) the intent to agree (conspire) and (2) the intent to accomplish the substantive offense. However, second-degree murder is not a "specific intent" crime.

Id. at 569-70.

In reviewing the Michigan Court of Appeals' decision in *Fernandez*, the Michigan Supreme Court examined California caselaw because California was

the only state to have "expressly discussed whether such a crime can logically exist." 398 N.W.2d at 319-20. "[T]he California Supreme Court held that evidence of diminished capacity could negate the specific intent required for conspiracy to commit first-degree murder, reducing the crime to conspiracy to commit second-degree murder or manslaughter, in the appropriate case." *Id.* at 320.

"[B]ecause no allegations of diminished capacity were made in this case," the Michigan Supreme Court declined to rule on whether it would adopt the California holding on the issue. *Id.* But the Court acknowledged that,

> [w]hile the California rule of the effect of diminished capacity on degrees of homicides varies significantly from the Michigan rule, the possibility exists under Michigan law that diminished capacity might possibly militate for the existence of the charge of conspiracy to commit second-degree murder.

Id. (citation omitted). Importantly, the phrase "the California rule of the effect of diminished capacity . . . varies significantly from the Michigan rule" suggests that the Court recognized an extant diminished-capacity defense in Michigan.

The Michigan Supreme Court next mentioned the diminished-capacity defense in the context of an ineffective-assistance-of-counsel claim in *People v. Griffin*, 444 N.W.2d 139 (Mich. 1989). Griffin asserted that his "trial counsel was ineffective for failing to . . . explore the defenses of diminished capacity and insanity." *Id.* at 140. The Court found that he had

"identified an issue . . . for which a testimonial record must be developed" and remanded the case for an evidentiary hearing on the issue. *Id.* Although the Court did not rule directly on the validity of the diminished-capacity defense, its decision to remand for an evidentiary hearing suggests that it believed, at least in its cursory review, that counsel could have been found ineffective for failing to assert the defense. If diminished capacity had been deemed an illegitimate defense, then counsel could not be faulted for failing to assert it, and no hearing on that issue would have been necessary.

The Michigan Supreme Court caselaw in the years following *Griffin* supports this reading of the case. In 1994, the Court held that "a necessary component of the diminished capacity defense is that the defendant was mentally ill." *People v. Pickens*, 521 N.W.2d 797, 812 (Mich. 1994). More recently, in *People v. Lloyd*, 590 N.W.2d 738 (Mich. 1999), the Court concluded that defense counsel's strategy to "present[] to the jury a merged defense of no premeditation and diminished capacity" instead of the defense of insanity "was entirely reasonable." *Id.* at 745. Indeed, the Michigan Court of Appeals held that *Lloyd* affirmatively "recognized the propriety of a diminished capacity defense to a charge of first-degree premeditated murder." *People v. Mette*, 621 N.W.2d 713, 718-19 (Mich. App. Ct. 2000).

Even in *Carpenter* itself, the Michigan Supreme Court suggested that diminished capacity was previously a valid defense, titling a section of its opinion "The *Continued* Viability of the Diminished Capacity Defense in Michigan." 627 N.W.2d at 282

(emphasis added). Lancaster had indeed utilized this well-recognized defense at his first trial in 1994, a defense that had been developed by over 20 years of Michigan court precedent at the time and that continued to be recognized right up to *Carpenter* in 2001.

c. Michigan's standard jury instructions

The belief that diminished capacity was a legitimate defense was so widely held by the Michigan legal community that, before *Carpenter*, the Michigan State Bar's Criminal Jury Instructions included an instruction on the defense. Commentary accompanying the instruction noted that "[t]he defense of diminished capacity is available when the defendant's mental impairment leaves him or her unable to form the specific intent needed to commit the crime." Standing Comm. on Std. Crim. Jury Instructions, Mich. State Bar, 1 *Mich. Crim. Jury Instructions* 6.3, at 6-11 (2d ed. 1994) (This instruction was removed only after *Carpenter* was decided.).

The district court below discounted the importance of the standard instruction on diminished capacity because the Michigan Criminal Jury Instructions are not officially sanctioned by the Michigan Supreme Court. But the use of these Standard Criminal Jury Instructions "is urged by the [Michigan] Supreme Court. according to Administrative Order 1977-1, 399 Mich 1xxii." *News & Notices: From the Committee on Standard Criminal Jury Instructions*, 78 Mich. B.J. 214, 214 (1999).

Furthermore, the instruction demonstrates that the Michigan State Bar, the author of the instructions,

recognized diminished capacity as a viable defense under Michigan criminal law prior to *Carpenter*. The instructions "are intended to accurately reflect the law in a format which is understandable to jurors." *Id.* In addition, the instructions indicate acceptance of the defense by Michigan's legal community. They are "used extensively by Michigan judges, prosecutors, and defense attorneys to instruct juries in criminal cases fairly and accurately." Standing Comm. on Std. Crim. Jury Instructions, Mich. State Bar, 1 *Mich. Criminal Jury Instructions*, at ix (2d ed. 1989). Even state prosecutors assumed that the diminished-capacity defense was a legitimate one, as indicated by the following comment made during closing argument by a prosecutor in *People v. Garfield*, 420 N.W.2d 124 (Mich. App. Ct. 1988): "[T]here are other defenses such as insanity or diminished capacity which are not before this Court . . . ." *Id.* at 128. Thus, contrary to the district court's conclusion, the status of diminished capacity as a defense in Michigan was quite well-established when Lancaster committed his offenses in 1993.

2. The holding in* Rogers v. Tennessee *is inapposite

As a result of the district court undervaluing the "foothold" that the diminished-capacity defense had established in Michigan law, it incorrectly concluded that this case is "strikingly similar to" *Rogers v. Tennessee*, 532 U.S. 451 (2001), in which the United States Supreme Court held that the abolition of a Tennessee common-law defense was foreseeable. But *Rogers* is readily distinguishable.

Rogers was convicted of second-degree murder for stabbing someone who died 15 months later as a result of medical complications caused by the attack. He appealed, contending that the common-law year-and-a-day rule precluded his conviction. This historic rule required that "no defendant could be convicted of murder unless his victim had died by the defendant's act within a year and a day." *Rogers*, 532 U.S. at 453. On appeal, the Tennessee Supreme Court "found that the original reasons for recognizing the rule no longer exist[ed]," formally abolished it, and denied Rogers's appeal on the ground that the rule no longer existed. *Id.* at 455.

The United States Supreme Court affirmed, holding that the retroactive application of the abolition of the year-and-the-day rule to Rogers's case did not violate his right to due process. *Id.* In so doing, the Court reasoned that "the Tennessee court's abolition of the year and a day rule was not unexpected and indefensible," *id.* at 462, and further explained:

> The year and a day rule is widely viewed as an outdated relic of the common law. Petitioner does not even so much as hint that good reasons exist for retaining the rule[.] . . . [A]s practically every court recently to have considered the rule has noted, advances in medical and related science have so undermined the usefulness of the rule as to render it without question obsolete.
>
> . . . .
>
> Finally, and perhaps most importantly, at the time of [Rogers]'s crime the year and a day

> rule had only the most tenuous foothold as part of the criminal law of the State of Tennessee. The rule did not exist as part of Tennessee's statutory criminal code. And while the Supreme Court of Tennessee concluded that the rule persisted at common law, it also pointedly observed that the rule had never once served as a ground of decision in any prosecution for murder in the State. Indeed, in all the reported Tennessee cases, the rule has been mentioned only three times, and each time in dicta.

Id. at 462-64 (citations omitted).

Applying *Rogers* to this case, the district court concluded that, just like the year-and- a-day rule, the diminished-capacity defense was ripe for abolition. But none of the United States Supreme Court's reasons for concluding that the elimination of the year-and- a-day rule was foreseeable pertain to Michigan's diminished-capacity defense.

First, unlike the year-and-a-day rule, the diminished-capacity defense had been in existence only since 1973. It was anything but an "outdated relic" rendered "obsolete" by advances in medical and related sciences at the time of Lancaster's offenses in 1993. The rationale behind the diminished-capacity defense is that mental illnesses and disabilities can cause a person, though legally sane, to lack the specific intent necessary to commit certain crimes. *Carpenter*, 627 N.W.2d at 280. In recent decades, the scientific community's knowledge and understanding of mental illnesses has greatly increased. *See* Surgeon General David Satcher, U.S. Dep't of Health & Human Servs.,

Mental Health: A Report of the Surgeon General 3 (1999), http://www.surgeongeneral.gov/library/mentalhealth/pdfs/c1.pdf ("This first Surgeon General's Report on Mental Health is issued at the culmination of a half-century that has witnessed remarkable advances in the understanding of mental disorders and the brain . . . ."). And these scientific advancements have worked to provide *greater* support for the diminished-capacity defense, not lesser. *See, e.g.*, Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afganistan with Posttraumatic Stress Disorder*, 85 Ind. L.J. 87, 126-28 (2010) (explaining that, as the understanding of Posttraumatic Stress Disorder (PTSD) has increased, "[r]ecent cases illustrate that some courts are willing to consider PTSD evidence . . . to rebut the prosecution's claim that the defendant had the requisite mens rea for a charged crime").

Moreover, as discussed above, the status of the diminished-capacity defense in 1993 cannot fairly be described as having "only the most tenuous foothold" in Michigan law. It had been recognized by the Michigan Court of Appeals many times, both before and after the 1975 codification of the insanity defense, and both before and after the 1994 amendments to that statute. Although the Michigan Supreme Court did not squarely address the validity of the defense until 2001, the Court had clearly acknowledged the defense in several of its previous rulings. Diminished capacity was also a recognized defense in the Michigan State Bar's Standard Criminal Jury Instructions. And, most importantly, it was widely used by defendants in the years prior to 2001. So widely used and accepted, in fact, that Lancaster himself was allowed to pursue the

defense during his first trial in 1994. Accordingly, the holding in *Rogers* is inapposite to this case.

3. The abolition of the diminished-capacity defense was unforeseeable

Lancaster could not have reasonably foreseen in 1993—when his crime was committed—that the consistent line of Michigan Court of Appeals' decisions upholding the diminished-capacity defense would have been overturned before his retrial in 2005. *See Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) ("When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law in its primary sense of an opportunity to be heard and to defend (his) substantive right." (internal quotation marks omitted)). The fact that the precedent is from Michigan's intermediate appellate court rather than the state's highest court does not diminish its significance. This point was recognized by the United States Supreme Court in *United States v. Lanier*, 520 U.S. 259 (1997), where the Court held "that decisions of the Courts of Appeals and other courts" could provide "fair warning" of what is proscribed by a criminal statute. *Id.* at 268-69.

In *Rathert v. Galaza*, 203 F. App'x 97 (9th Cir. 2006), the Ninth Circuit applied *Lanier* to the California Supreme Court's interpretation of a criminal statute. Rathert, convicted of burglary in a California state court, petitioned for federal habeas relief under 28 U.S.C. § 2254 because "the California Supreme Court [had] retroactively abrogated a specific intent requirement established by a decade old, uncontradicted, and controlling [intermediate]

appellate court case." *Id.* at 99. The Ninth Circuit granted the petition, holding that "the California Supreme Court unreasonably applied clearly established United States precedent" that prohibited the retroactive application of an "unforeseeable judicial enlargement of a criminal statute." *Id.* at 98-99.

Here, the intermediate-appellate-court precedent was much more robust than in *Rathert*. Indeed, numerous uncontradicted Michigan Court of Appeals' rulings recognized diminished capacity as a defense over the course of 28 years—almost triple the 10-year span that existed in *Rathert*. And the Michigan Court of Appeals, unlike California's courts of appeals, serves the state as a whole. *See* Mich. Const. art. VI, § 1 ("The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, [and] one court of appeals . . . .").

Furthermore, the question at the heart of the foreseeability analysis is whether Lancaster had been deprived of the "due process of law in its primary sense of an opportunity to be heard and to defend (his) substantive right." *Bouie*, 78 U.S. at 354. The Michigan Court of Appeals' decision in *People v. McRunels*, 603 N.W.2d 95 (Mich. Ct. App. 1999), provides strong support for how retroactively applying *Carpenter* adversely affected the fundamental fairness of Lancaster's trial.

In *McRunels*, the defendant was charged with assault with intent to commit murder for acts that occurred in 1993. McRunels asserted the insanity defense at his jury trial. The trial court, however, retroactively applied the 1994 amendments to the codified insanity defense and required McRunels to

prove his insanity by a preponderance of the evidence. At the time that McRunels committed the alleged acts, however, the insanity defense was still governed by the common-law burden of proof, which required the government to prove beyond a reasonable doubt that McRunels was not insane once he presented evidence in support of the argument that he was.

Under the new and more stringent evidentiary standard, the jury rejected McRunels's defense of insanity and found him guilty. McRunels appealed, arguing that the trial court had erred in instructing the jury to apply the newly enacted burden of proof. His appeal was reviewed under the plain-error standard because he had failed to object to the jury instruction at the time that it was given. For an error to warrant reversal under the Michigan (and federal) plain-error standard of review, the error must have "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 97; *accord United States v. Young*, 470 U.S. 1, 15 (1985).

The Michigan Court of Appeals concluded that altering the burden of proof was a substantive change to the law, and that its retroactive application violated the Ex Post Facto Clause. It also determined that the Ex Post Facto Clause violation seriously affected the fairness, integrity, or public reputation of the judicial proceedings. The court therefore reversed the judgment and remanded the case for a new trial using the old common-law burden of proof. We believe that the 2001 judicial elimination of the diminished-capacity defense here was just as unforeseeable to Lancaster in 1993 as was the statutory alteration in the burden of proof for insanity in *McRunels*, and at least as substantive.

C. The retroactive application of *Carpenter* was an unreasonable application of clearly established Supreme Court precedent

Having determined that *Carpenter*'s abolition of the diminished-capacity defense was unforeseeable, we must next decide whether the Michigan courts' retroactive application of *Carpenter* to Lancaster's retrial in 2005 was an unreasonable application of clearly established United States Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

Without question, the Supreme Court has clearly established that the unforeseeable judicial enlargement of criminal statutes, if applied retroactively, would violate a defendant's right to due process. *See, e.g.*, *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). The Michigan Court of Appeals acknowledged as much in the last substantive opinion that it issued in this case:

> In criminal cases, . . . due process concerns prevent retroactive application [of court decisions] in some cases. This is especially true where the decision is unforeseeable and has the effect of changing existing law. But retroactive application does not implicate due process or ex post facto concerns where the decision does not change the law and is not unforeseeable.

People v. Lancaster, No. 263483, 2006 WL 3751420, at *1 (Mich. Ct. App. Dec. 21, 2006) (per curiam) (unpublished opinion)(citations omitted). Following these principles, the court then held that *Carpenter* "did not involve a change in the law because it concerned an unambiguous statute that was interpreted by the Supreme Court [of Michigan] for the first time." *Id.*

We find this application of *Bouie* and *Rogers* objectively unreasonable. It ignores Michigan's codified court rules that regard published opinions of the Michigan Court of Appeals as binding precedent unless overturned by the Michigan Supreme Court. *See* Mich. Ct. R. 7.215(C)(2) (explaining that published Michigan Court of Appeals' opinions "ha[ve] precedential effect under the rule of stare decisis"). The Michigan Court of Appeals' assertion that the reversal of several decades of its own precedent was not a "change in the law" thus belies the Michigan Supreme Court's own rules. Moreover, the Michigan Court of Appeals' determination that the 1975 insanity-defense statute unambiguously abolished the diminished-capacity defense similarly disregards all of its own cases upholding the diminished-capacity defense even after the enactment of that statute. The Michigan Court of Appeals' decision in this case, therefore, was an objectively unreasonable application of clearly established United States Supreme Court precedent.

D. Lancaster was prejudiced by the retroactive application of *Carpenter*

Finally, the State argues that even if the retroactive application *Carpenter* violated Lancaster's right to due process, the violation was harmless. But

the State failed to raise this issue in the district court and has therefore waived it on appeal. *See Keith v. Bobby*, 618 F.3d 594, 599 n.4 (6th Cir. 2010) (ruling that a party in a habeas case waives an argument on appeal by failing to raise the same argument before the district court).

And even assuming arguendo that the State has not waived this argument, it would still fail. Preventing a defendant from presenting his only viable defense at trial is so prejudicial that holding the violation harmless would suggest that almost no constitutional violation would warrant reversal. *See, e.g.*, *Crane v. Kentucky*, 476 U.S. 683, 687 (1986) (explaining that a defendant has a "fundamental constitutional right to a fair opportunity to present a defense"); *Rockwell v. Yukins*, 341 F.3d 507, 517 (6th Cir. 2003) ("The [Supreme] Court has long held that an accused's right to establish a defense is a fundamental element of due process." (internal quotation marks omitted)).

The district court briefly addressed the issue of harmlessness, even though the issue was not raised by either party, and concluded that, because the jury in Lancaster's first trial convicted him despite his defense of diminished capacity, the later bench trial would have yielded the same result even if the defense had been allowed. This reasoning, however, ignores the fact that the jury trial was impermissibly tainted by a *Batson* violation and, as a result, the jury's verdict had to be vacated. To rely upon the conclusion that the jury reached, despite the discriminatory means used to select the jury, would negate the very reason for vacating the first conviction and would allow the

Batson violation to once again affect the outcome of Lancaster's case. We are therefore not persuaded by the district court's analysis on this issue.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the decision of the district court and **GRANT** Lancaster's petition for a writ of habeas corpus unless the State commences a new trial within 180 days of this Opinion in which Lancaster is permitted to assert the defense of diminished capacity.

DISSENT

ALICE M. BATCHELDER, Chief Judge, dissenting. I respectfully dissent from the majority's decision because Lancaster has not overcome AEDPA's very high standard to establish that the Michigan Court of Appeals's determination was an unreasonable application of or contrary to Supreme Court precedent. Before obtaining habeas relief from a federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786–87 (2011). Lancaster challenges the Michigan Court of Appeals's denial of his due process claim, arguing that it unreasonably applied or issued a decision contrary to *Rogers v. Tennessee*, 532 U.S. 451 (2001). *Rogers* holds that "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where

it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" 532 U.S. at 462 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)). Although the Michigan Court of Appeals did not expressly apply this rule, the court rejected Lancaster's due process claim, finding that the application of *Carpenter*'s abolishing of the diminishedcapacity defense to Lancaster's second trial did not violate his due process rights. Giving the Michigan Court of Appeals's determination the benefit of the doubt required under AEDPA's highly deferential standard, *Slagle v. Bagley*, 457 F.3d 501, 514 (6th Cir. 2006) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)), I cannot agree that it was objectively unreasonable.

The majority concludes that the Michigan Court of Appeals unreasonably applied *Rogers* and *Bouie* when it held that *Carpenter* did not involve a change in the law that was susceptible to a due process challenge. However, the majority's concern rests not on the Michigan Court of Appeals's application of *Rogers* and *Bouie*, but on that court's application of Michigan law. In concluding that *Carpenter* did not constitute a change in Michigan law, the court of appeals applied Michigan state law; it did not apply *Bouie*, *Rogers*, or any other Supreme Court precedent. *See Michigan v. Lancaster*, No. 263483, 2006 WL 3751420, at *1 (Mich. Ct. App. Dec. 21, 2006) (citing *Michigan v. Doyle*, 545 N.W.2d 627, 636 (Mich. 1996), as holding that under Michigan law, the first interpretation of an unambiguous statute is not a change in law for the purposes of *ex post facto* and due process concerns). Although it seems illogical for the Michigan Court of Appeals to ignore the practical consequences of

Carpenter and conclude that abolishing the diminished-capacity defense was not a change in law, that conclusion is not relevant to our review because it was based on state, not federal, law. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Instead, we must determine if the Michigan Court of Appeals's adjudication of Lancaster's due process claim contradicts clearly established Supreme Court precedent. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam); *Murphy v. Ohio*, 551 F.3d 485, 505 (6th Cir. 2009) ("[A] state-court decision can be found reasonable as long as neither the reasoning nor the result of the decision contradicts United States Supreme Court precedent." (internal quotation marks omitted)). Because the court's conclusion is consistent with *Rogers* and *Bouie*, it was not "so lacking in justification" as to entitle Lancaster to habeas relief. *See Harrington*, 131 S. Ct. at 786–87.

The Michigan Court of Appeals's denial of Lancaster's due process claim was reasonable primarily because the diminished-capacity defense was not well-established in Michigan and its elimination was, therefore, foreseeable. Under *Rogers*, the retroactive application of a judicial alteration of common law violates due process only when the alteration was unexpected and indefensible. *Rogers*, 532 U.S. at 462 (quoting *Bouie*, 378 U.S. at 354). In Lancaster's case, *Carpenter*'s abolishing of the diminishedcapacity defense was foreseeable. As the majority notes, diminished capacity arose in 1973, but Michigan courts chose to discuss diminished capacity not as a separate defense, but rather as an aspect of

insanity. When the legislature codified insanity as a defense in 1975, it omitted any reference to a lower-capacity standard, and Michigan courts issued "a series of decisions continuing to address [the] diminished capacity defense as a form of the statutory insanity defense." *Michigan v. Carpenter*, 627 N.W.2d 276, 282 (Mich. 2001). And when the legislature amended the insanity statute in 1994, it still did not include any reference to diminished capacity. Surely the legislature's choice not to codify diminished capacity is more significant than the state bar association's choice to include it in its publication of standard jury instructions. Simply put, prior to *Carpenter*'s official elimination of the defense, neither the Michigan legislature nor the Michigan courts gave diminished capacity standing as a separate defense. Instead, the courts discussed diminished capacity as an aspect of insanity, and they applied the concept through the parameters of the insanity statute.

It is indisputable that defendants were able to raise the defense prior to *Carpenter*, but the availability of the defense alone does not make its elimination unexpected. Indeed, in *Rogers*, the year-and-a-day rule had been available to defendants for nearly one hundred years, but the Supreme Court nevertheless concluded that its elimination was foreseeable because the rule never served as the basis for a decision in the state and many other states had abolished the rule. In Michigan, diminished capacity likewise never served as the basis for any court's decision. Even in *Michigan v. Griffin*, 444 N.W.2d 139 (Mich. 1989), the Michigan Supreme Court's remand for an evidentiary hearing to determine if counsel was ineffective for failing to raise diminished capacity as a

defense reemphasizes only the point that the defense was available. It does not indicate that the defense was so well established that its elimination was unexpected.

The majority attempts to distinguish *Rogers*'s holding by arguing that "none of the United States Supreme Court's reasons for concluding that the elimination of the year-and-a-day rule was foreseeable pertain to Michigan's diminished capacity defense." In reaching this conclusion, however, the majority overlooks the fact that several states have expressly abolished the use of the diminished-capacity defense in many contexts[1]—a factor the Court looked to in *Rogers* to determine whether a rule's elimination was foreseeable. Although due process does not require that

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[1] *See, e.g.*, Cal. Penal Code § 25(a) (2011); *Mincey v. Head*, 206 F.3d 1106, 1139 (11th Cir. 2000) (applying Georgia law and recognizing that no state court has adopted the defense); *Barnett v. Alabama*, 540 So. 2d 810, 812 (Ala. Crim. App. 1988); *Arizona v. Laffoon*, 610 P.2d 1045, 1047 (Ariz. 1980); *O'Brien v. United States*, 962 A.2d 282, 300–01 (D.C. 2008); *Hodges v. Florida*, 885 So. 2d 338, 352 n.8 (Fla. 2003); *Hawaii v. Klafta*, 831 P.2d 512, 73 Haw. 109, 117 (Haw. 1992); *Cardine v. Indiana*, 475 N.E.2d 696, 698 (Ind. 1985); *Iowa v. Plowman*, 386 N.W.2d 546, 548 (Iowa Ct. App. 1986) (stating that the defense is not available for general intent crimes); *Kansas v. Pennington*, 132 P.3d 902, 908 (Kan. 2006); *Louisiana v. Thompson*, 665 So. 2d 643, 647 (La. Ct. App. 1995); *Maryland v. Greco*, 24 A.3d 135, 144 (Md. Ct. Spec. App. 2011); *Massachusetts v. Finstein*, 687 N.E.2d 638, 640 (Mass. 1997); *Cuypers v. Minnesota*, 711 N.W.2d 100, 105 (Minn. 2006); *Stevens v. Mississippi*, 806 So. 2d 1031, 1051 (Miss. 2001); *North Carolina v. Adams*, 354 S.E.2d 338, 343 (N.C. Ct. App. 1987); *Ohio v. Wilcox*, 436 N.E.2d 523, 533 (Ohio 1981); *South Carolina v. Santiago*, 634 S.E.2d 23, 163 (S.C. Ct. App. 2006); *Tennessee v. Grose*, 982 S.W.2d 349, 353 (Tenn. Crim. App. 1997); *Davis v. Texas*, 313 S.W.3d 317, 328 (Tex. Crim. App. 2010); *Keats v. Wyoming*, 115 P.3d 1110, 1119 (Wyo. 2005).

a defendant be aware of the law of other states, the Supreme Court stated that "the fact that a vast number of jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed." *Rogers*, 532 U.S. at 464.

Moreover, the majority ignores the Supreme Court's main concern in *Rogers*—whether the retroactive application of the change in law was "an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect." *Id.* at 467. *Carpenter* abolished the diminished-capacity defense nearly five years before Lancaster's second trial. In my view, applying *Carpenter* to Lancaster several years after it was handed down was neither unfair nor arbitrary, especially when Lancaster was able to argue insanity under the still-available insanity statute. The majority's reliance on *Michigan v. McRunels*, 173 N.W.2d 95 (Mich. Ct. App. 1999), to argue the contrary is misplaced because *McRunels* is not instructive on the issue of foreseeability. In *McRunels*, the court considered the retroactive application of a statutory, rather than a judicial, change in the law; therefore, the court never considered whether the change was foreseeable. *See McRunels*, 603 N.W.2d at 99–102; *see also Rogers*, 532 U.S. at 459–62 (explaining that retroactive applications of statutory changes in law are analyzed under *ex post facto* principles while judicial changes are analyzed "in accordance with the more basic and general principle of fair warning"). Accordingly, *McRunels* is materially distinguishable,

and the majority's reliance on it to illustrate forseeability is incorrect. Considering other jurisdictions' elimination of the diminished-capacity defense, the length of time between *Carpenter* and Lancaster's second trial, and the lack of independent standing that the defense had in Michigan—each of which were considerations of the Court in *Rogers*—the principles of *Rogers* indicate that *Carpenter*'s abolishing of the defense was not unexpected.

Because the elimination of the diminished-capacity defense in Michigan was neither unexpected nor indefensible, the Michigan Court of Appeals's adjudication of Lancaster's due process claim was consistent with Supreme Court precedent. Accordingly, it was not so lacking in justification as to entitle Lancaster to habeas relief under AEDPA's strict standard, and, therefore, I must respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 10-2112

FILED
Jun 29, 2012
LEONARD GREEN,
Clerk

BURT LANCASTER,
Petitioner-Appellant,
v.
LINDA METRISH,
MICHIGAN DEPARTMENT OF CORRECTIONS, and
PATRICIA L. CARUSO, Director,
Respondents-Appellees.

Before: BATCHELDER, Chief Judge; CLAY and GILMAN, Circuit Judges.

JUDGMENT

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the decision of the district court is REVERSED, and Lancaster's petition for a writ of habeas corpus is GRANTED unless the State commences a new trial within 180 days of this Opinion in which Lancaster is permitted to assert the defense of diminished capacity.

ENTERED BY ORDER OF THE COURT
Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BURT R. LANCASTER,
Petitioner,

Case No. 07-13692

v.

HONORABLE AVERN COHN

LINDA METRISH,
Respondent.
_____/

AMENDED* MEMORANDUM AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

* This Amended Memorandum incorporates the Errata issued August 19, 2010.

I. Introduction

This is a habeas case under 28 U.S.C. § 2254. Petitioner Burt Lancaster (Petitioner) is a state prisoner. He was convicted after a bench trial in Oakland County on one count of first-degree murder and possession of a firearm in the commission of a felony. Petitioner was sentenced to life imprisonment on the first-degree murder conviction and received a consecutive two year prison sentence on the felony-firearm conviction.

Petitioner, through counsel, has filed petition for a writ of habeas corpus claiming he is incarcerated in violation of his constitutional rights.[1] Petitioner specifically claims that he was deprived of his due process right to present a defense when the trial court retroactively applied a change in Michigan law to preclude him from raising a diminished capacity defense. Respondent says that the claim lacks merit. The Court agrees. Accordingly, the petition will be denied. The reasons follow.

II. Background

A.

Petitioner's convictions arose from an incident that occurred on April 23,1993, when Petitioner shot and killed his married girlfriend, Toni King, in the parking lot of a Southfield, Michigan shopping plaza. Petitioner was charged with first degree murder and felony firearm. At trial, Petitioner did not deny killing King but raised the defense of insanity and diminished

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[1] As will be explained, this is Petitioner's second habeas petition.

capacity. A jury rejected both defenses and convicted him as charged. Petitioner was sentenced to life imprisonment on the murder charge and two years consecutive for the felony firearm charge.

Petitioner filed a direct appeal. The Michigan Court of Appeals affirmed his conviction and sentence in a per curiam decision. People v. Lancaster, No. 184033, 1998 WL 1991149 (Mich. Ct. App. June 23, 1999). The Michigan Supreme Court denied leave to appeal in a standard order. People v. Lancaster, 459 Mich. 951 (1999).

In 2000, Petitioner, through counsel, filed a habeas petition raising several claims, including a Batson[2] claim. Lancaster v. Adams, 01-70691. The case was assigned to the undersigned who granted the writ based on Petitioner's Batson claim. See Opinion and Order Conditionally Granting Writ of Habeas Corpus, filed September 25, 2001 (Doc. No. 26). Respondent appealed. The Court of Appeals for the Sixth Circuit affirmed. Lancaster v. Adams, 324 F.3d 423 (6th Cir. 2003). The Supreme Court denied certiorari. Lancaster v. Adams, 540 U.S. 1004 (2003).

Petitioner was retried at a bench trial on the same charges. As will be explained, the trial court did not permit Petitioner to raise a diminished capacity defense because the Michigan Supreme Court held, in a decision handed down after Petitioner's first trial, that the defense does not exist under Michigan law. See People v. Carpenter, 464 Mich. 223 (2001). Petitioner was, however, able to make an offer of proof

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[2] Batson v. Kentucky, 476 U.S. 79 (1986).

as to his mental state. Petitioner was again convicted and sentenced to life imprisonment and two years consecutive. The Michigan courts affirmed Petitioner's conviction. People v. Lancaster, No. 263483 (Mich. Ct. App. 2006), lv. den., 478 Mich. 870 (2007).

Petitioner returned again to federal court and filed the present petition[3] in which he seeks the issuance of a writ of habeas corpus based on the following claim:

> I. Abolishing a defense is a substantive change in the law, and U.S. Const, AM V & XIV, prohibits the judiciary from applying such a change retroactively.

> III. Standard of Review

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
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28 U.S.C. § 2254(d); Harpster v. State of Ohio, 128 F. 3d 322, 326 (6th Cir. 1997).

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. An "unreasonable application" occurs when the state court identifies the correct legal principle from a Supreme Court's decision but unreasonably applies that principle to the facts of the prisoner's case. Williams v. Taylor, 529 U.S. 362, 412-413 (2000). A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Id. at 411.

IV. Analysis

A.

Federal law is clear on the right to present a defense. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he also has the right to present his own witnesses to establish a defense. This right is a fundamental element of the due process of law. Washington v. Texas, 388 U.S. 14, 19 (1967); see also Crane v. Kentucky, 476 U.S. 683, 690 (1986)("whether rooted directly in the Due Process

Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'")(internal citations omitted). However, an accused in a criminal case does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence. Montana v. Egelhoff, 518 U.S. 37, 42 (1996). The Supreme Court, in fact, has indicated its "traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts." Crane, 476 U.S. at 689. The Supreme Court gives trial court judges "wide latitude" to exclude evidence that is repetitive, marginally relevant, or that poses a risk of harassment, prejudice, or confusion of the issues. Id. (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)). Finally, rules that exclude evidence from criminal trials do not violate the right to present a defense unless they are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" United States v. Scheffer, 523 U.S. 303, 308 (1998)(quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)). Finally, the federal constitution does not require a state to recognize a diminished capacity defense. See Wong v. Money, 142 F.3d 313, 324 (6th Cir. 1998).

Petitioner says that precluding him from raising a diminished capacity defense at his retrial violated the Ex Post Facto clause of the U. S. Constitution, Article 1, §§ 9 and 10 and denied him of due process of law. Federal law is also clear on this. The Ex Post Facto clause provides as follows: "No State shall . . . pass . . . any ex post facto Law." U.S. Const. Art. I, § 10, cl. 1.

The Ex Post Facto clause has been interpreted by the Supreme Court to apply to the retroactive elimination of a "defense" as that term is linked to the "legal definition of [an] offense" or "the nature or amount of the punishment for its commission." Collins v. Youngblood, 497 U.S. 37, 50 (1990)(quoting Beazall v. Ohio, 269 U.S. 167, 169-170 (1925)).

The Supreme Court has held that the limitations on ex post facto judicial decision making are inherent in the notion of due process. In Bouie v. City of Columbia, 378 U.S. 347, 354-55 (1964), the Supreme Court held that an unforeseeable judicial enlargement of a criminal statute, applied retroactively, violates the federal due process right to fair warning of what constitutes criminal conduct. See also Marks v. United States, 430 U.S. 188, 191-92 (1977) (stating that people have a fundamental right to fair warning of conduct which will give rise to criminal penalties and "that right is protected against judicial action by the Due Process Clause of the Fifth Amendment"). The constitutionality of judicial action turns on the traditional due process principles of "notice, foreseeability, and, in particular, the right to fair warning." Bouie, 378 U.S. at 458-59; see also Hook v. Sheets, 603 F.3d 316, 321 (6th Cir. 2010) (citing Bouie).

In Rogers v. Tennessee, 532 U.S. 451, 462 (2001), the Supreme Court clarified Bouie when it ruled that "judicial alteration of a common law doctrine of criminal law violates the principles of fair warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue." Id. at 462; see also United States v. Barton,

455 F.3d 649, 654 (6th Cir. 2006) (interpreting Rogers and stating that "when addressing ex post facto-type due process concerns, questions of notice, foreseeability, and fair warning are paramount").

B.

The Michigan Court of Appeals, the last court to have issued a substantive decision on this issue, rejected Petitioner's claim as follows:

> We reject defendant's claim that retroactive application of our Supreme Court's decision in People v Carpenter, 464 Mich. 223, 241; 627 NW2d 276 (2001)], violates the Ex Post Facto Clauses of the United States and Michigan Constitutions. The general rule is that judicial decisions are given full retroactive effect. People v Neal, 459 Mich 72, 80; 586 NW 2d 716 (1998). In criminal cases, however, ex post facto and due process concerns prevent retroactive application in some cases. People v Doyle, 451 Mich 93, 100-101; 545 NW 2d 627 (1996). This is especially true where the decision is unforeseeable and has the effect of changing existing law. Id. But retroactive application does not implicate due process or ex post facto concerns where the decision does not change the law and is not unforeseeable.
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> In this case, as in Doyle, supra, the prior decision did not involve a change in the law because it concerned an unambiguous statute that was interpreted by the Supreme Court for the first time. See id. at 113. In Carpenter, supra at 230-237, our Supreme Court

> addressed a question of statutory interpretation that had not been previously been decided; i.e. whether diminished capacity was a valid defense. In so doing, the [Michigan Supreme] Court determined that the comprehensive statutory framework encompassing insanity disclosed that the Legislature intended that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent. Id. at 237. Specifically, the Court found that there was no indication that the Legislature intended to make diminished capacity an affirmative defense. Id. at 235-236. In these circumstances, retroactive application of Carpenter does not violate the Ex Post Facto Clauses or implicate any due process concerns."

Lancaster, No. 263483, Slip. Op. at *1-2.

C.

1.

As noted above, the Michigan Supreme Court in People v. Carpenter, 464 Mich. 223 (2001) held that diminished capacity was not a defense that existed under M.C.L. § 768.21a, a statute which took effect in 1975. Carpenter was decided after Petitioner's first trial but before his retrial. Petitioner claims that the Michigan Supreme Court's interpretation of the statute had the effect of denying him of a defense that he utilized at his prior jury trial. At retrial, Petitioner sought again to use a diminished capacity defense and made an offer of proofs of expert testimony that had

been provided at his first trial. The trial court denied this request based on the holding in Carpenter. The Michigan Court of Appeals affirmed and found no constitutional violation essentially because the Carpenter decision was not unforeseeable.

2.

In order to provide context for determining Petitioner's claims, a brief recitation of the history in Michigan of the insanity defense, as well as the recognition of a diminished capacity defense, in is order. The defense of insanity has been governed by statute since 1975. Legal insanity is an affirmative defense requiring proof that, as a result of mental illness or being mentally retarded as defined in the mental health code, the defendant lacked "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law." M.C.L. § 768.21a(1). The statute provides that "[t]he defendant has the burden of proving the defense of insanity by a preponderance of the evidence." M.C.L. § 768.21a(3).

M.C.L. § 768.36 sets forth the consequences of a jury's finding that a defendant is guilty of an offense and that, although the defendant was mentally ill at the time the offense charged was committed, the defendant was not legally insane. If a defendant is found "guilty but mentally ill," the trial court "shall impose any sentence which could be imposed pursuant to law upon a defendant who is convicted of the same offense." M.C.L. § 768.36(3). If incarcerated, the defendant must "undergo further evaluation and be given such treatment as is psychiatrically indicated for

his mental illness or retardation." Id. If the defendant is placed on probation, "the trial judge, upon recommendation of the center for forensic psychiatry, shall make treatment a condition of probation." M.C.L. § 768.36(4).

Under the common law in Michigan before the Legislature's enactment of 1975 PA 180, the test for determining legal insanity was controlled by the test enunciated in People v. Durfee, 62 Mich. 487 (1886). The Durfee test was based in part on the M'Naghten rule: " '[A]t the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.' " People v. Martin, 386 Mich. 407, 415, 192 N.W.2d 215 (1971)(quoting Daniel M'Naghten's Case, (HL 1843) 10 Cl.Fin. 200 (8 Eng.Rep. 718), 722 (1843). The subsequent enactment of M.C.L. § 768.21a(1) codified these common law principles.

Diminished capacity is a defense at common law which originated in Scotland in 1867. See State v. Wilcox, 70 Ohio St.2d 182, 436 N.E.2d 523 (1982). The state of California, in turn, is considered to be the jurisdiction that pioneered the defense in the United States. Wilcox, supra at 187. The defense allows a defendant, even though legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime. See, e.g., People v. Jones, 151 Mich. App. 1, 5-6 (1986). "[T]he theory is that if because of mental disease or defect a defendant cannot form the specific state of mind required as an essential element of a crime, he may be

convicted only of a lower grade of the offense not requiring that particular mental element." Chestnut v. State, 538 So.2d 820, 822 (Fla., 1989) (citation omitted).[1]

The defense of diminished capacity was first introduced in Michigan in the case of People v. Lynch, 47 Mich. App. 8 (1973). The defendant in Lynch was a young mother charged with first-degree murder for starving her infant.[5] She did not pursue an insanity defense. However, in order to show she lacked the requisite intent for first-degree murder, she sought to introduce testimony from two psychiatrists as to her mental state. The trial court refused to admit the evidence on the ground that defendant had never raised an insanity defense and did not give the required statutory notice. The jury convicted defendant of first-degree murder.

The Michigan Court of Appeals reversed defendant's conviction. The court of appeals

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[1] The diminished capacity defense has been the subject of much debate in the United States. There is a wide divergence of views among the states concerning the admissibility of evidence of mental illness short of insanity. See, generally, 1 Robinson, Criminal Law Defenses, § 64(a), pp 272-279.

[5] It is perhaps not surprising that the defense of diminished capacity first appeared in a case involving a mother killing her infant, sometimes called infanticide. An examination into a mother's mental state often reveals evidence of depression and other mental defects which bear directly on the mother's intent to commit such a crime. Applying the defense of diminished capacity is one way in which the law has attempted to deal with the crime. See Brenda Barton, Comment, When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers, 51 SMU L. REV. 591, 619 (1998).

acknowledged that some states viewed mental capacity as "an all or nothing matter and that only insanity ... negates criminal intent," but concluded that proof of diminished capacity is admissible as "bearing on intent generally or at least on those special states of mind where a specific intent is required or whether the state of mind by definition determines the degree of offense as here." Lynch, 47 Mich. App at 20. The court of appeals also disagreed that recognizing a diminished capacity defense separate from legal insanity "would permit the defense to in effect sneak in the insanity defense without labeling it as such and without the necessity of complying with the notice statute as to the insanity defense." Id.

3.

The question on habeas review is whether the Michigan Supreme Court's decision in Carpenter is constitutionally significant. That is, was it unforeseeable that the defense may be abolished or is it otherwise unfair to apply the holding of Carpenter to Petitioner. The answer is no. First, after the Michigan Court of Appeals' decision in Lynch, the Michigan Supreme Court acknowledged in passing the concept of the diminished capacity defense, but it never specifically authorized its use in the Michigan courts. See Carpenter, 464 Mich. at 232-33 (citing People v. Lloyd, 459 Mich. 433 (1999) (holding that defense counsel was not constitutionally ineffective for presenting a diminished capacity defense as opposed to a defense of legal insanity); People v. Pickens, 446 Mich. 298 (1994) (same); People v. Griffin, 433 Mich. 860 (1989) (remanding for a hearing on claim that trial counsel was ineffective for failing explore defenses of

insanity and diminished capacity). Thus, although diminished capacity has been utilized as a defense since 1973, it has never been codified by the legislature as a viable defense or formally adopted by the state's highest court. As such, the defense has never enjoyed a solid foothold in Michigan's criminal law.

Moreover, what occurred here is strikingly similar to the circumstances in Rogers v. Tennessee, 532 U.S. 451 (2001). In Rogers, the Tennessee Supreme Court abolished the common-law rule that the death of a victim within a year and a day after being assaulted is a prerequisite to a homicide prosecution. The court then applied the abolition to uphold the murder conviction under consideration where death occurred fifteen months after the assault. The Supreme Court also upheld the conviction, holding that the retroactive abolition of the year-and-a-day rule did not violate Rogers' due process rights. Furthermore, the Supreme Court noted that a judicial extension of the Ex Post Facto Clause "would circumvent the ... [c]lause's clear text, which expressly applies only to legislatures; would evince too little regard for the important institutional and contextual differences between legislating and common law decisionmaking; would be incompatible with the resolution of uncertainty that marks any evolving legal system; and would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system." Rogers, 532 U.S. at 452.

In Carpenter, the Michigan Supreme Court abolished a principle of common law just like the Tennessee Supreme Court did it Rogers. Like the year and a day rule at issue in Rogers, the diminished

capacity defense has been the subject of much debate. See n. 4, supra. Neither the year and a day rule nor the defense of diminished capacity existed as part of the statutory criminal code. Moreover, much like the Michigan Supreme Court's treatment of the diminished capacity defense, the year and the day rule had never served as a ground of decision in any murder case and was only mentioned as dicta in reported Tennessee law. Under these circumstances, the Michigan Supreme Court's decision in Carpenter to abolish the diminished capacity defense cannot be said to have been "unexpected and indefensible" such that application of Carpenter to Petitioner represents the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect. This was not a situation where the Michigan Supreme Court overruled years of its own precedent. Rather, in Carpenter the Michigan Supreme Court formally addressed the question, which it had left open, of whether diminished capacity is a viable defense in Michigan in light of the statutory scheme. As the Court of Appeals for the Eight Circuit put it: "[t]he interpretation and exposition of state law is the prerogative of the state's highest court. The Supreme Court of Missouri is entitled to correct a lower court's mistaken reading of a state statute without running afoul of the Due Process Clause." Hagan v. Caspari, 50 F.3d 542, 547 (8th Cir. 1995).

Finally, Petitioner has no unfettered right to the continued application of the common law. As the Supreme Court said in Rogers:

> . . . where, as here, the allegedly impermissible judicial application of a rule of law involves not

> the interpretation of a statute but an act of common law judging. In the context of common law doctrines (such as the year and a day rule), there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. Such judicial acts, whether they be characterized as "making" or "finding" the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements. Strict application of ex post facto principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of ex post facto principles. It was on account of concerns such as these that Bouie restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." Bouie v. City of Columbia, 378 U.S., at 354, 84 S.Ct. 1697 (internal quotation marks omitted).

Rogers, 542 U.S. at 461. In short, Petitioner's due process rights were not violated by application of the Michigan Supreme Court's decision in Carpenter at his

retrial which prevented him from presenting a diminished capacity defense.[6]

V. Conclusion

For the reasons stated above, Petitioner's rights were not violated by the application of the Michigan Supreme Court's decision in Carpenter at his retrial. The Michigan Court of Appeals did not err in concluding the same. Accordingly, the petition is DENIED.

Dated: August 19, 2010

S/Avern Cohn
AVERN COHN
UNITED STATES
DISTRICT JUDGE

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[6] As Respondent argues, it can be said that any error in preventing Petitioner from raising a diminished capacity defense was harmless. A jury rejected the defense at Petitioner's first trial. Although that trial was rendered invalid, the Batson violation had nothing to due with the evidence in the case. Moreover. the trial court on retrial considered Petitioner's mental condition, as entered through the testimony of Petitioner's mother. Although Petitioner's trial counsel was precluded from bringing experts to testify as to Petitioner's mental state and formally present a diminished capacity defense, the trial court permitted an offer of proof was provided as to the expert testimony proved at petitioner's first trial. The trial court gave wide latitude to defense counsel and the prosecution to make a record as to the substance of the testimony previously offered. In finding Petitioner guilty, the trial court considered Petitioner's mental state, but expressly found that "that there was sufficient evidence for the Court to find premeditation beyond a reasonable doubt." The trial court further found that although Petitioner's thinking may have been affected by his mental condition, the court did not believe "it was to the extent that it would affect or acts as a defense . . to that element."

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, August 19, 2010, by electronic and/or ordinary mail.

S/Deborah R. Tofil
Relief Case Manager,
(313) 234-5160

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BURT R. LANCASTER,
Petitioner,

Case No. 07-13692

v.

HONORABLE AVERN COHN

LINDA METRISH,
Respondent.
_____/

ERRATA

This is a habeas case under 28 U.S.C. § 2254. On August 18, 2010, the Court issued a Memorandum and Order Denying Petition for Writ of Habeas Corpus. Footnote six of the Memorandum contains an inaccurate statement. The first sentence of footnote six currently states:

> Although Respondent has not raised it, an argument can be made that any error in preventing Petitioner from raising a diminished capacity defense was harmless.

Respondent did raise a harmless error argument. Accordingly, the first sentence of footnote six is AMENDED to state as follows:

> As Respondent argues, it can be said that any error in preventing Petitioner from raising a diminished capacity defense was harmless.

SO ORDERED.

S/Avern Cohn
AVERN COHN
UNITED STATES
DISTRICT JUDGE

Dated: August 19, 2010

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MEMORANDUM AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

This is a habeas case under 28 U.S.C. § 2254. Petitioner Burt Lancaster (Petitioner) is a state prisoner. He was convicted after a bench trial in Oakland County on one count of first-degree murder and possession of a firearm in the commission of a felony. Petitioner was sentenced to life imprisonment on the first-degree murder conviction and received a consecutive two year prison sentence on the felony-firearm conviction.

Petitioner, through counsel, has filed petition for a writ of habeas corpus claiming he is incarcerated in violation of his constitutional rights.[1] Petitioner specifically claims that he was deprived of his due

[1] As will be explained, this is Petitioner's second habeas petition.

process right to present a defense when the trial court retroactively applied a change in Michigan law to preclude him from raising a diminished capacity defense. Respondent says that the claim lacks merit. The Court agrees. Accordingly, the petition will be denied. The reasons follow.

II. Background

A.

Petitioner's convictions arose from an incident that occurred on April 23,1993, when Petitioner shot and killed his married girlfriend, Toni King, in the parking lot of a Southfield, Michigan shopping plaza. Petitioner was charged with first degree murder and felony firearm. At trial, Petitioner did not deny killing King but raised the defense of insanity and diminished capacity. A jury rejected both defenses and convicted him as charged. Petitioner was sentenced to life imprisonment on the murder charge and two years consecutive for the felony firearm charge.

Petitioner filed a direct appeal. The Michigan Court of Appeals affirmed his conviction and sentence in a per curiam decision. People v. Lancaster, No. 184033, 1998 WL 1991149 (Mich. Ct. App. June 23, 1999). The Michigan Supreme Court denied leave to appeal in a standard order. People v. Lancaster, 459 Mich. 951 (1999).

In 2000, Petitioner, through counsel, filed a habeas petition raising several claims, including a Batson[2] claim. Lancaster v. Adams, 01-70691. The case was

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[2] Batson v. Kentucky, 476 U.S. 79 (1986).

assigned to the undersigned who granted the writ based on Petitioner's Batson claim. See Opinion and Order Conditionally Granting Writ of Habeas Corpus, filed September 25, 2001 (Doc. No. 26). Respondent appealed. The Court of Appeals for the Sixth Circuit affirmed. Lancaster v. Adams, 324 F.3d 423 (6th Cir. 2003). The Supreme Court denied certiorari. Lancaster v. Adams, 540 U.S. 1004 (2003).

Petitioner was retried at a bench trial on the same charges. As will be explained, the trial court did not permit Petitioner to raise a diminished capacity defense because the Michigan Supreme Court held, in a decision handed down after Petitioner's first trial, that the defense does not exist under Michigan law. See People v. Carpenter, 464 Mich. 223 (2001). Petitioner was, however, he was able to make an offer of proof as to his mental state. Petitioner was again convicted and sentenced to life imprisonment and two years consecutive. The Michigan courts affirmed Petitioner's conviction. People v. Lancaster, No. 263483 (Mich. Ct. App. 2006), lv. den., 478 Mich. 870 (2007).

Petitioner returned again to federal court and filed the present petition[3] in which he seeks the issuance of a writ of habeas corpus based on the following claim:

> I. Abolishing a defense is a substantive change in the law, and U.S. Const, AM V & XIV.

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[3] The petition, filed in 2007, was originally assigned to a different judge. Recently, the case was reassigned to the undersigned as a companion to Petitioner's 2000 case. See Order of Reassignment, filed May 19, 2010 (Doc. No. 9). Following reassignment, the Court held oral argument on July 21, 2010.

prohibits the judiciary from applying such a change retroactively.

III. Standard of Review

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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28 U.S.C. § 2254(d); Harpster v. State of Ohio, 128 F. 3d 322, 326 (6th Cir. 1997).

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state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Id. at 411.

IV. Analysis

A.

Federal law is clear on the right to present a defense. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he also has the right to present his own witnesses to establish a defense. This right is a fundamental element of the due process of law. Washington v. Texas, 388 U.S. 14, 19 (1967); see also Crane v. Kentucky, 476 U.S. 683, 690 (1986)("whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'")(internal citations omitted). However, an accused in a criminal case does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence. Montana v. Egelhoff, 518 U.S. 37, 42 (1996). The Supreme Court, in fact, has indicated its "traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts." Crane, 476 U.S. at 689. The Supreme Court gives trial court judges "wide latitude" to exclude evidence that is repetitive, marginally relevant, or that poses a risk of harassment, prejudice, or confusion of the issues. Id.

(quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)). Finally, rules that exclude evidence from criminal trials do not violate the right to present a defense unless they are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" United States v. Scheffer, 523 U.S. 303, 308 (1998)(quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)). Finally, the federal constitution does not require a state to recognize a diminished capacity defense. See Wong v. Money, 142 F.3d 313, 324 (6th Cir. 1998). Petitioner says that precluding him from raising a diminished capacity defense at his retrial violated the Ex Post Facto clause of the U. S. Constitution, Article 1, §§ 9 and 10 and denied him of due process of law. Federal law is also clear on this. The Ex Post Facto clause provides as follows: "No State shall . . . pass . . . any ex post facto Law." U.S. Const. Art. I, § 10, cl. 1. The Ex Post Facto clause has been interpreted by the Supreme Court to apply to the retroactive elimination of a "defense" as that term is linked to the "legal definition of [an] offense" or "the nature or amount of the punishment for its commission." Collins v. Youngblood, 497 U.S. 37, 50 (1990)(quoting Beazall v. Ohio, 269 U.S. 167, 169-170 (1925)).

The Supreme Court has held that the limitations on ex post facto judicial decision making are inherent in the notion of due process. In Bouie v. City of Columbia, 378 U.S. 347, 354-55 (1964), the Supreme Court held that an unforeseeable judicial enlargement of a criminal statute, applied retroactively, violates the federal due process right to fair warning of what constitutes criminal conduct. See also Marks v. United States, 430 U.S. 188, 191-92 (1977) (stating that people have a fundamental right to fair warning of conduct

which will give rise to criminal penalties and "that right is protected against judicial action by the Due Process Clause of the Fifth Amendment"). The constitutionality of judicial action turns on the traditional due process principles of "notice, foreseeability, and, in particular, the right to fair warning." Bouie, 378 U.S. at 458-59; see also Hook v. Sheets, 603 F.3d 316, 321 (6th Cir. 2010) (citing Bouie).

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In this case, as in Doyle, supra, the prior decision did not involve a change in the law because it concerned an unambiguous statute that was interpreted by the Supreme Court for the first time. See id. at 113. In Carpenter, supra at 230-237, our Supreme Court addressed a question of statutory interpretation that had not been previously been decided; i.e. whether diminished capacity was a valid defense. In so doing, the [Michigan Supreme] Court determined that the comprehensive statutory framework encompassing insanity disclosed that the Legislature intended that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent. Id. at 237. Specifically, the Court found that there was no indication that the Legislature intended to make diminished capacity an affirmative defense. Id. at 235-236. In these circumstances, retroactive application of Carpenter does not violate the Ex Post Facto Clauses or implicate any due process concerns."

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2.

In order to provide context for determining Petitioner's claims, a brief recitation of the history in Michigan of the insanity defense, as well as the recognition of a diminished capacity defense, in is order. The defense of insanity has been governed by statute since 1975. Legal insanity is an affirmative defense requiring proof that, as a result of mental illness or being mentally retarded as defined in the mental health code, the defendant lacked "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his

or her conduct to the requirements of the law." M.C.L. § 768.21a(1). The statute provides that "[t]he defendant has the burden of proving the defense of insanity by a preponderance of the evidence." M.C.L. § 768.21a(3).

M.C.L. § 768.36 sets forth the consequences of a jury's finding that a defendant is guilty of an offense and that, although the defendant was mentally ill at the time the offense charged was committed, the defendant was not legally insane. If a defendant is found "guilty but mentally ill," the trial court "shall impose any sentence which could be imposed pursuant to law upon a defendant who is convicted of the same offense." M.C.L. § 768.36(3). If incarcerated, the defendant must "undergo further evaluation and be given such treatment as is psychiatrically indicated for his mental illness or retardation." Id. If the defendant is placed on probation, "the trial judge, upon recommendation of the center for forensic psychiatry, shall make treatment a condition of probation." M.C.L. § 768.36(4).

Under the common law in Michigan before the Legislature's enactment of 1975 PA 180, the test for determining legal insanity was controlled by the test enunciated in People v. Durfee, 62 Mich. 487 (1886). The Durfee test was based in part on the M'Naghten rule: " '[A]t the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.' " People v. Martin, 386 Mich. 407, 415, 192 N.W.2d 215 (1971)(quoting Daniel M'Naghten's Case,

(HL 1843) 10 Cl.Fin. 200 (8 Eng.Rep. 718), 722 (1843). The subsequent enactment of M.C.L. § 768.21a(1) codified these common law principles.

Diminished capacity is a defense at common law which originated in Scotland in 1867. See State v. Wilcox, 70 Ohio St.2d 182, 436 N.E.2d 523 (1982). The state of California, in turn, is considered to be the jurisdiction that pioneered the defense in the United States. Wilcox, supra at 187. The defense allows a defendant, even though legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime. See, e.g., People v. Jones, 151 Mich. App. 1, 5-6 (1986). "[T]he theory is that if because of mental disease or defect a defendant cannot form the specific state of mind required as an essential element of a crime, he may be convicted only of a lower grade of the offense not requiring that particular mental element." Chestnut v. State, 538 So.2d 820, 822 (Fla., 1989) (citation omitted).[4]

The defense of diminished capacity was first introduced in Michigan in the case of People v. Lynch, 47 Mich. App. 8 (1973). The defendant in Lynch was a young mother charged with first-degree murder for starving her infant.[5] She did not pursue an insanity

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[4] The diminished capacity defense has been the subject of much debate in the United States. There is a wide divergence of views among the states concerning the admissibility of evidence of mental illness short of insanity. See, generally, 1 Robinson, Criminal Law Defenses, § 64(a), pp 272-279.

[5] It is perhaps not surprising that the defense of diminished capacity first appeared in a case involving a mother killing her infant, sometimes called infanticide. An examination into a

defense. However, in order to show she lacked the requisite intent for first-degree murder, she sought to introduce testimony from two psychiatrists as to her mental state. The trial court refused to admit the evidence on the ground that defendant had never raised an insanity defense and did not give the required statutory notice. The jury convicted defendant of first-degree murder.

The Michigan Court of Appeals reversed defendant's conviction. The court of appeals acknowledged that some states viewed mental capacity as "an all or nothing matter and that only insanity ... negates criminal intent," but concluded that proof of diminished capacity is admissible as "bearing on intent generally or at least on those special states of mind where a specific intent is required or whether the state of mind by definition determines the degree of offense as here." Lynch, 47 Mich. App at 20. The court of appeals also disagreed that recognizing a diminished capacity defense separate from legal insanity "would permit the defense to in effect sneak in the insanity defense without labeling it as such and without the necessity of complying with the notice statute as to the insanity defense." Id.

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mother's mental state often reveals evidence of depression and other mental defects which bear directly on the mother's intent to commit such a crime. Applying the defense of diminished capacity is one way in which the law has attempted to deal with the crime. See Brenda Barton, Comment, When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers, 51 SMU L. REV. 591, 619 (1998).

3.

The question on habeas review is whether the Michigan Supreme Court's decision in Carpenter is constitutionally significant. That is, was it unforeseeable that the defense may be abolished or is it otherwise unfair to apply the holding of Carpenter to Petitioner. The answer is no. First, after the Michigan Court of Appeals' decision in Lynch, the Michigan Supreme Court acknowledged in passing the concept of the diminished capacity defense, but it never specifically authorized its use in the Michigan courts. See Carpenter, 464 Mich. at 232-33 (citing People v. Lloyd, 459 Mich. 433 (1999) (holding that defense counsel was not constitutionally ineffective for presenting a diminished capacity defense as opposed to a defense of legal insanity); People v. Pickens, 446 Mich. 298 (1994) (same); People v. Griffin, 433 Mich. 860 (1989) (remanding for a hearing on claim that trial counsel was ineffective for failing explore defenses of insanity and diminished capacity). Thus, although diminished capacity has been utilized as a defense since 1973, it has never been codified by the legislature as a viable defense or formally adopted by the state's highest court. As such, the defense has never enjoyed a solid foothold in Michigan's criminal law.

Moreover, what occurred here is strikingly similar to the circumstances in Rogers v. Tennessee, 532 U.S. 451 (2001). In Rogers, the Tennessee Supreme Court abolished the common-law rule that the death of a victim within a year and a day after being assaulted is a prerequisite to a homicide prosecution. The court then applied the abolition to uphold the murder conviction under consideration where death occurred

fifteen months after the assault. The Supreme Court also upheld the conviction, holding that the retroactive abolition of the year-and-a-day rule did not violate Rogers' due process rights. Furthermore, the Supreme Court noted that a judicial extension of the Ex Post Facto Clause "would circumvent the ... [c]lause's clear text, which expressly applies only to legislatures; would evince too little regard for the important institutional and contextual differences between legislating and common law decisionmaking; would be incompatible with the resolution of uncertainty that marks any evolving legal system; and would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system." Rogers, 532 U.S. at 452.

In Carpenter, the Michigan Supreme Court abolished a principle of common law just like the Tennessee Supreme Court did it Rogers. Like the year and a day rule at issue in Rogers, the diminished capacity defense has been the subject of much debate. See n. 4, supra. Neither the year and a day rule nor the defense of diminished capacity existed as part of the statutory criminal code. Moreover, much like the Michigan Supreme Court's treatment of the diminished capacity defense, the year and the day rule had never served as a ground of decision in any murder case and was only mentioned as dicta in reported Tennessee law. Under these circumstances, the Michigan Supreme Court's decision in Carpenter to abolish the diminished capacity defense cannot be said to have been "unexpected and indefensible" such that application of Carpenter to Petitioner represents the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect. This

was not a situation where the Michigan Supreme Court overruled years of its own precedent. Rather, in Carpenter the Michigan Supreme Court formally addressed the question, which it had left open, of whether diminished capacity is a viable defense in Michigan in light of the statutory scheme. As the Court of Appeals for the Eight Circuit put it: "[t]he interpretation and exposition of state law is the prerogative of the state's highest court. The Supreme Court of Missouri is entitled to correct a lower court's mistaken reading of a state statute without running afoul of the Due Process Clause." Hagan v. Caspari, 50 F.3d 542, 547 (8th Cir. 1995).

Finally, Petitioner has no unfettered right to the continued application of the common law. As the Supreme Court said in Rogers:

> . . . where, as here, the allegedly impermissible judicial application of a rule of law involves not the interpretation of a statute but an act of common law judging. In the context of common law doctrines (such as the year and a day rule), there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. Such judicial acts, whether they be characterized as "making" or "finding" the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements. Strict application of ex post facto principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common

> law system. The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of ex post facto principles. It was on account of concerns such as these that Bouie restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." Bouie v. City of Columbia, 378 U.S., at 354, 84 S.Ct. 1697 (internal quotation marks omitted).

Rogers, 542 U.S. at 461. In short, Petitioner's due process rights were not violated by application of the Michigan Supreme Court's decision in Carpenter at his retrial which prevented him from presenting a diminished capacity defense.[6]

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[6] Although Respondent has not raised it, an argument can be made that any error in preventing Petitioner from raising a diminished capacity defense was harmless. A jury rejected the defense at Petitioner's first trial. Although that trial was rendered invalid, the Batson violation had nothing to due with the evidence in the case. Moreover, the trial court on retrial considered Petitioner's mental condition, as entered through the testimony of Petitioner's mother. Although Petitioner's trial counsel was precluded from bringing experts to testify as to Petitioner's mental state and formally present a diminished capacity defense, the trial court permitted an offer of proof was provided as to the expert testimony proved at petitioner's first trial. The trial court gave wide latitude to defense counsel and the prosecution to make a record as to the substance of the testimony previously offered. In finding Petitioner guilty, the trial court considered Petitioner's mental state, but expressly found that "that there was sufficient evidence for the Court to find premeditation beyond a reasonable

V. Conclusion

For the reasons stated above, Petitioner's rights were not violated by the application of the Michigan Supreme Court's decision in Carpenter at his retrial. The Michigan Court of Appeals did not err in concluding the same. Accordingly, the petition is DENIED.

SO ORDERED.

Dated: August 18, 2010

S/Avern Cohn
AVERN COHN
UNITED STATES
DISTRICT JUDGE

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, August 18, 2010, by electronic and/or ordinary mail.

S/Julie Owens
Case Manager,
(313) 234-5160

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doubt." The trial court further found that although Petitioner's thinking may have been affected by his mental condition, the court did not believe "it was to the extent that it would affect or acts as a defense . . . to that element."

Order **Michigan Supreme Court**
Lansing, Michigan

May 30, 2007

Clifford W. Taylor,
133115 Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v SC: 133115
COA: 263483
Oakland CC: 1993-127632-FC
BURT R. LANCASTER,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the December 21, 2006 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 30, 2007 *Corbin R. Davis*
Clerk

Court of Appeals, State of Michigan
ORDER

People of MI v Burt R Lancaster

Docket No. 263483

LC No. 1993-127632-FC

Donald S. Owens
Presiding Judge

Helene N. White

Joel P. Hoekstra
Judges

The Court orders that the motion for reconsideration is DENIED.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 23 2007 — Date

Sandra Schultz Mengel — Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,	UNPUBLISHED December 21, 2006
Plaintiff-Appellee,	
v	No. 263483 Oakland Circuit Court
BURT R. LANCASTER,	LC No. 1993-127632-FC
Defendant-Appellant.	

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Following a bench trial defendant was convicted of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was not denied his constitutional right to present a defense. The trial court permitted defendant to present evidence in support of his theory that he did not have the requisite intent for first-degree murder. The court only precluded defendant from pursuing a defense of diminished capacity. The

trial court properly disallowed the diminished capacity defense because such a defense is not recognized in Michigan. *People v Carpenter*, 464 Mich 223, 241; 627 NW2d 276 (2001). Further, the refusal to allow evidence of a mental disorder short of insanity to negate the mens rea element of the charged crime did not violate defendant's right to due process. *Clark v Arizona*, ___ US ___; 126 S Ct 2709, 2732-2737; 165 L Ed 2d 842 (2006).

We reject defendant's claim that retroactive application of our Supreme Court's decision in *Carpenter*, *supra*, violates the Ex Post Facto Clauses of the United States[1] and Michigan[2] Constitutions. The general rule is that judicial decisions are given full retroactive effect. *People v Neal*, 459 Mich 72, 80; 586 NW2d 716 (1998). In criminal cases, however, ex post facto and due process concerns prevent retroactive application in some cases. *People v Doyle*, 451 Mich 93, 100-101; 545 NW2d 627 (1996). This is especially true where the decision is unforeseeable and has the effect of changing existing law. *Id.* at 101. But retroactive application does not implicate due process or ex post facto concerns where the decision does not change the law and is not unforeseeable. *Id.*

In this case, as in *Doyle*, *supra*, the prior decision did not involve a change in the law because it concerned an unambiguous statute that was interpreted by the Supreme Court for the first time. See *id.* at 113. In *Carpenter*, *supra* at 230-237, our Supreme Court addressed a question of statutory

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[1] US Const, art I, § 10, cl 1; art I, § 9, cl 3.

[2] Const 1963, art 1, § 10.

interpretation that had not previously been decided, i.e., whether diminished capacity was a valid defense. In doing so, the Court determined that the comprehensive statutory framework encompassing insanity disclosed that the Legislature intended that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent. *Id.* at 237. Specifically, the Court found that there was no indication that the Legislature intended to make diminished capacity an affirmative defense. *Id.* at 235-236. In these circumstances, retroactive application of *Carpenter* does not violate the Ex Post Facto Clauses or implicate any due process concerns.[3]

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Joel P. Hoekstra

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[3] We note that this Court reached this same conclusion in *People v Talton*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 25, 2002 (Docket No. 231986), slip op at 4-6, which is cited by plaintiff. Although unpublished decisions are not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1), we find the reasoning in *Talton* persuasive.

Order

Michigan Supreme Court
Lansing, Michigan

Entered:
December 9, 2004

127080

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 127080
COA: 256914
Oakland CC: 93-127632-FC

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellee,

v

BURT R. LANCASTER,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the September 3, 2004 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should now be reviewed by this Court.

CAVANAGH and KELLY, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 9, 2004 — Corbin R. Davis
Clerk

Court of Appeals, State of Michigan
ORDER

People of MI v Burt R Lancaster

Docket No. 256914

LC No. 93-127632-FC

Mark J. Cavanagh
Presiding Judge

Kathleen Jansen

Henry William Saad
Judges

The Court orders that the application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review.

Mark Cavanagh

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

SEP -3 2004 *Sandra Schultz Mengel*
Date Chief Clerk

Case No. 10-2112

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

BURT LANCASTER
Petitioner - Appellant

v.

LINDA METRISH; MICHIGAN DEPARTMENT OF CORRECTIONS; PATRICIA L. CARUSO, Director
Respondents Appellees

BEFORE: BATCHELDER, Chief Circuit Judge; CLAY and GILMAN, Circuit Judges;

Upon consideration of motion to stay mandate,

It is ORDERED that the mandate be stayed to allow appellees time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk
Deborah S. Hunt

Issued: September 12, 2012

No. 10-2112
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BURT LANCASTER,
Petitioner-Appellant,

v.

LINDA METRISH, ET AL.,
Respondents-Appellees.

FILED
Aug 27, 2012
LEONARD GREEN,
Clerk

ORDER

BEFORE: BATCHELDER, Chief Judge; CLAY and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Chief Judge Batchelder would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT
Leonard Green
Leonard Green, Clerk

OPPOSITION BRIEF

RECORD
AND
BRIEFS

FILED
DEC 2 9 2012
OFFICE OF THE CLERK

No. 12-547

In the Supreme Court of the United States

LINDA METRISH, WARDEN,
Petitioner,

v.

BURT LANCASTER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petition for a Writ of Certiorari should be denied where the Sixth Circuit correctly applied the AEDPA standard of review and this Court's precedents to determine that the Michigan courts' retroactive application of the unforeseeable judicial abrogation of the diminished capacity defense violated Respondent's due process rights and was an objectively unreasonable application of those precedents.

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OPINION BELOW

Respondent Burt Lancaster respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case, issued on June 29, 2012, reproduced in the appendix to the petition (Pet. App.) at 1a-35a, and reported in *Lancaster v. Metrish*, 683 F.3d 740 (6th Cir. 2012). The district court's amended memorandum and order is reported in *Lancaster v. Metrish*, 735 F. Supp. 2d 750 (E.D. Mich. 2010), and reproduced at Pet. App. 37a-54a. The opinion of the Michigan Court of Appeals is not reported, but is available at *People v. Lancaster*, No. 263483, 2006 WL 3751420 (Mich. Ct. App. Dec. 21, 2006), and reproduced at Pet. App. 76a-78a.

STATEMENT OF THE CASE

Respondent Burt Lancaster respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case because it does not merit this Court's review, as it does not present any of the reasons that this Court traditionally considers as warranting the grant of a writ of certiorari. *See* Sup. Ct. R. 10. Specifically, the Sixth Circuit did not decide an important issue of federal law that has not yet been, but should be, decided by this Court; the Sixth Circuit did not decide an important federal question in a way that conflicts with relevant decisions of this Court; and the Sixth Circuit's decision does not present an important matter as to which the decisions of the Circuit Courts of Appeals conflict. This Court has already provided clear guidance to the lower courts for

assessing the due process implications of retroactively applied changes in state law, and, even if one were to accept the State's arguments as correct, this case, at most, would merely present a situation in which the Sixth Circuit misapplied a properly stated rule of law, a circumstance under which a writ of certiorari is "rarely granted." Sup. Ct. R. 10. The State's premise is, in any event, incorrect; the Sixth Circuit correctly applied the relevant statutes and this Court's precedents.

A. Respondent's First Trial and Post-Conviction Proceedings

On April 22, 1993, Respondent, a former Detroit police officer with a long history of severe mental health problems, killed his girlfriend in broad daylight. He was charged in the Oakland County, Michigan, Circuit Court with first-degree murder and possession of a firearm in the commission of a felony. After a 1994 trial at which he raised the defenses of insanity and diminished capacity,[1] he was convicted as charged and sentenced to a mandatory term of life imprisonment for the murder charge plus two years for the felony firearm offense.

Following exhaustion of his direct appellate remedies in state court, Respondent petitioned in the Eastern District of Michigan for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was granted

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[1] The trial judge instructed the jury as to diminished capacity by using the language of the then-standard jury instruction on the subject, Mich. Crim. Jury Instructions 6.3 (2d ed. 1994).

by the Hon. Avern Cohn on the ground that the trial court had violated Respondent's right pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), to a jury selected free from racial discrimination. *Lancaster v. Adams*, No. 00-CV-70691-DT (E.D. Mich. Sept. 25, 2001). The Sixth Circuit affirmed, *Lancaster v. Adams*, 324 F.3d 423 (6th Cir. 2003), and this Court denied certiorari, *Adams v. Lancaster*, 540 U.S. 1004 (2003).

B. Respondent's Second Trial

Respondent was retried in 2005. In pretrial proceedings, he sought an *in limine* ruling that the intervening Michigan Supreme Court decision in *People v. Carpenter*, 627 N.W.2d 276 (Mich. 2001), which held that the diminished capacity defense had been abrogated by the enactment of Mich. Comp. Laws § 768.21a, could not as a matter of due process be retroactively applied to preclude him from asserting a defense that had been available at the time of the offense and upon which he had relied at his first trial. The trial judge denied the motion, and Respondent's interlocutory appeals were unsuccessful. *People v. Lancaster*, No. 256914 (Mich. Ct. App. Sept. 3, 2004) (Pet. App. 81a) (denying application for leave to appeal); *People v. Lancaster*, No. 127080 (Mich. Dec. 9, 2004) (Pet. App. 79a-80a) (denying application for leave to appeal over; Cavanaugh and Kelly, JJ., dissenting).

At his retrial, Respondent was permitted to make an offer of proof on a separate record as to the evidence of diminished capacity that he would have presented to the trier of fact had he been permitted to do so. He was convicted as charged and once again sentenced to life imprisonment plus two years.

C. Post-Conviction Proceedings

Following his conviction after the second trial, Respondent appealed as of right to the Michigan Court of Appeals raising the following issues:

> I. THE RIGHT TO PRESENT COMPETENT EVIDENCE NEGATING AN ELEMENT OF THE CHARGED OFFENSE IS AN ASPECT OF MR. LANCASTER'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE GUARANTEED BY U.S. CONST, AM V. VI & XIV, AND CONST 1963, ART 1, § 17 & 20.
>
> II. ABOLISHING A DEFENSE IS A SUBSTANTIVE CHANGE IN THE LAW, AND U.S. CONST, AM V & XIV, AND CONST 1963, ART 1, § 17, PROHIBIT BOTH THE LEGISLATURE AND THE JUDICIARY FROM APPLYING SUCH A CHANGE RETROACTIVELY.

On December 21, 2006, the Michigan Court of Appeals affirmed Respondent's conviction in an unpublished per curiam opinion, *People v. Lancaster*, No. 263483, 2006 WL 3751420 (Mich. Ct. App. Dec. 21, 2006) (Pet. App. 76a-78a), and subsequently denied Respondent's motion for reconsideration, *People v. Lancaster*, No. 263483 (Mich. Ct. App. Jan. 23, 2007) (Pet. App. 75a). On May 30, 2007, the Michigan Supreme Court denied Respondent's timely application for leave to appeal in which he raised the retroactivity

issue that had been raised in the Court of Appeals.[2] *People v. Lancaster*, 731 N.W.2d 743 (Mich. 2007) (Pet. App. 74a).

On August 18, 2010, Hon. Avern Cohn, District Judge, denied Respondent's timely petition for a writ of habeas corpus; on August 19, the court entered an amended memorandum and order correcting a misstatement in the initial memorandum and order. *Lancaster v. Metrish*, 735 F. Supp. 2d 750 (E.D. Mich. 2010) (Pet. App. 37a-54a). Following Respondent's timely filing of a notice of appeal, Judge Cohn, noting that "reasonable jurists might debate the [c]ourt's conclusion that Petitioner is not entitled to habeas relief," sua sponte granted a certificate of appealability on August 27, 2010. *Lancaster v. Metrish*, No. 07-13692, 2010 WL 3397336, at *1 (E.D. Mich. Aug. 27, 2010).

In his appeal to the Sixth Circuit, Respondent raised the following issue:

> WHERE, AT THE TIME OF PETITIONER'S OFFENSE, THE RIGHT TO PRESENT EVIDENCE OF DIMINISHED CAPACITY WAS FIRMLY ESTABLISHED AS A MATTER OF MICHIGAN LAW AND THERE WAS NO FAIR WARNING THAT THE RIGHT MIGHT BE ABROGATED, AND WHERE PETITIONER PRESENTED EVIDENCE OF DIMINISHED

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[2] Issue I as raised in the Court of Appeals was not pursued because of the intervening decision of this Court in *Clark v. Arizona*, 548 U.S. 735 (2006).

CAPACITY AT HIS FIRST TRIAL AND HIS CONVICTION FOLLOWING THAT TRIAL WAS SET ASIDE AS A RESULT OF CONSTITUTIONAL ERROR, IT WAS A DENIAL OF DUE PROCESS, U.S. CONST, AM V & XIV, FOR A MICHIGAN SUPREME COURT DECISION ABROGATING THE RIGHT EIGHT YEARS AFTER PETITIONER'S OFFENSE TO BE APPLIED RETROACTIVELY TO PRECLUDE PETITIONER FROM PRESENTING EVIDENCE OF DIMINISHED CAPACITY AT HIS RETRIAL.

On June 29, 2012, the Sixth Circuit reversed the district court's denial of the writ of habeas corpus, holding that the Michigan Court of Appeals unreasonably applied this Court's decisions in *Rogers v. Tennessee*, 532 U.S. 451 (2001), and *Bouie v. City of Columbia*, 378 U.S. 347 (1964), to reach the conclusion that Respondent's due process rights were not violated by the retroactive application of *Carpenter*. *Lancaster v. Metrish*, 683 F.3d 740 (6th Cir. 2012) (Pet. App. 1a-35a). The Sixth Circuit examined the consistent line of decisions from the Michigan Court of Appeals and Michigan Supreme Court that, without exception, recognized the existence of the diminished capacity defense – both before and after the enactment in 1975 of Mich. Comp. Laws § 768.21a – and held that the defense was well-established under Michigan law prior to *Carpenter*. (Pet. App. 9a-19a). The Sixth Circuit noted that none of the factors that justified retroactive application of a change in law in *Rogers* were present in the instant case, and held that *Carpenter*'s abolition of the diminished capacity defense was unforeseeable. (Pet. App. 19a-25a). Finally, applying the standard of

review mandated by AEDPA, the Sixth Circuit held that the retroactive application of *Carpenter* to Respondent was an unreasonable application of this Court's clearly established precedent in *Bouie* and *Rogers*. (Pet. App. 26a-27a). Chief Judge Batchelder dissented, concluding that – notwithstanding the fact that "it seems illogical for the Michigan Court of Appeals to ignore the practical consequences of *Carpenter* and conclude that abolishing the diminished-capacity defense was not a change in law" – the decision was "not so lacking in justification as to entitle Lancaster to habeas relief." (Pet. App. 30a-31a (citation and internal quotation marks omitted)).

REASONS FOR DENYING THE PETITION

The issue presented in this case does not merit this Court's review, and the facts of this case would present a poor vehicle for addressing that issue. The State does not allege that the issue presented is an unresolved issue of great importance, nor, in light of the clear guidance already provided by this Court and the unique, fact-bound nature of this case, is it one. There is no allegation that the Sixth Circuit identified or applied the wrong legal principles or ignored relevant precedent, nor did it. There is no supportable allegation that the case presents a circuit split, nor does one exist. In sum, the State has wholly failed to satisfy any of this Court's traditional criteria for granting certiorari. *See* Sup. Ct. R. 10. At most, the State argues that the Sixth Circuit has misapplied a properly stated rule of law. As this Court's rules make clear, petitions for the writ of certiorari are "rarely granted" under these circumstances. *Id.* The arguments presented by the amici do not alter this conclusion.

THE SIXTH CIRCUIT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

The issue presented in this case has long been resolved and clarified by this Court. In *Bouie*, 378 U.S. 347, and *Rogers*, 532 U.S. 451, this Court provided clear guidance to the lower courts tasked with assessing the due process implications of retroactively applied changes in state law. The State does not argue otherwise. Indeed, as the Petition for a Writ of Certiorari lays bare (*see* Pet. at 4), the State's arguments amount to nothing more than a claim that the Sixth Circuit identified the proper rules of law but misapplied them to this case. However, a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Importantly, this case presents an extremely unusual set of facts and a quirk of chronology unlikely to be repeated in other circumstances; even if the relevant issues were unresolved, lower courts are not in need of guidance on these issues. Michigan courts recognized and assumed without question the availability of the diminished capacity defense since at least 1973. *See People v. Lynch*, 208 N.W.2d 656 (Mich. Ct. App. 1973). Two years later, the Michigan Legislature, for the first time, codified the insanity defense. Mich. Comp. Laws § 768.21a. For the next twenty-six years, Michigan courts continued to recognize and assume, without question, the continued existence of the diminished capacity defense. Indeed, in 1978 the Michigan Court of Appeals expressly held that

the 1975 statute encompassed the diminished capacity defense and that an accused raising the defense must comply with the procedural requirements set out in that statute. *People v. Mangiapane*, 271 N.W.2d 240, 249 (Mich. Ct. App. 1978); *see also People v. Mette*, 621 N.W.2d 713, 719 (Mich. Ct. App. 2000) ("This [c]ourt has consistently held that the defense of diminished capacity comes within the codified definition of legal insanity and is subject to the same procedural requirements."). When the Michigan Supreme Court finally determined – eight years *after* Respondent committed the acts here at issue – that the defense had been abrogated, it did so in a case in which it had originally granted leave to appeal solely to consider whether the defendant properly bore the burden to establish the defense.

When Respondent was first tried in 1994, it was universally held and unquestioned in the Michigan courts that a diminished capacity defense was available to him, and he properly raised the defense at that trial. Because his first trial was tainted by a violation of his right to a jury selected free from racial discrimination, *see Batson*, 476 U.S. 79, Respondent was retried eleven years after his first trial. In the interim, the Michigan Supreme Court held that the diminished capacity defense had been abrogated by the enactment of Mich. Comp. Laws § 768.21a, after having consistently assumed the continued viability of the defense up through the issuance in 2001 of its opinion in *Carpenter*, 627 N.W.2d 276. In sum, Respondent was first tried at a time when the Michigan courts uniformly acknowledged the existence of the diminished capacity defense; he raised that defense at his first trial; his first trial was subsequently

determined to have been tainted by a violation of his right to a jury selected free of racial bias; he was retried after the Michigan Supreme Court abolished the defense; and he was not permitted to raise the defense at his retrial even though the first trial had been fatally tainted by structural, constitutional error.

Even leaving aside the plain correctness of the Sixth Circuit's holding that such a turn of events was unforeseeable and the retroactive application of *Carpenter* was a denial of due process, it is clear that this highly unusual set of facts is unlikely to be repeated and does not merit this Court's consideration. The Sixth Circuit's fact-bound application of *Rogers* and *Bouie* to the unusual circumstances of this case does not warrant this Court's review.

THE SIXTH CIRCUIT DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT

Contrary to the State's argument, the Sixth Circuit's decision in this case does not conflict with *Rogers* or *Bouie*, or with the standard of review mandated by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d)(1). The Sixth Circuit identified the correct legal principles drawn from those cases and engaged in a straightforward application of those principles and the statutory standard of review to this unique set of circumstances, an intensely fact-bound inquiry based upon a factual pattern that is unlikely to be repeated.

The State's argument that the Sixth Circuit's decision conflicts with *Rogers* essentially boils down to an argument that because the Sixth Circuit found that

Respondent's due process rights had been violated, while, on the basis of a starkly different set of facts and circumstances, *Rogers* found no due process violation, the Sixth Circuit's decision necessarily must conflict with *Rogers*. However, as the Sixth Circuit correctly noted, none of the rationales that justified retroactive application of the abolition of the "year and a day" rule in *Rogers* are present with respect to the abolition of the diminished capacity defense. There is no conflict between the Sixth Circuit's decision and *Rogers*.

In this case, the Sixth Circuit correctly ruled that the Michigan Supreme Court's abolition of the diminished capacity defense in 2001 – eight years after the offense was committed and seven years after Respondent's first trial – was unexpected and unforeseeable in 1993, and thus could not, consistent with due process, be applied retroactively to Respondent. Indeed, as noted above, in *Carpenter*, the Michigan Supreme Court "originally granted leave to consider whether the lower courts properly determined that it was defendant's burden to establish his diminished capacity defense by a preponderance of the evidence under M.C.L. § 768.21a." *Carpenter*, 627 N.W.2d at 277. Thus, the Michigan Supreme Court took it as a given that such a defense existed at the time. Under these circumstances, where even the Michigan Supreme Court treated the defense as a given in 2001, it was objectively unreasonable to suggest that abolition of the defense was foreseeable in 1993, just as it was objectively unreasonable for the Michigan Court of Appeals to determine in this case that the Michigan Supreme Court's interpretation of § 768.21a "did not involve a change in the law because it concerned an unambiguous statute that was interpreted by the

[Michigan] Supreme Court for the first time." (Pet. App. 77a).

Moreover, the notion that § 768.21a "unambiguously" reflected the legislature's intent to abrogate the diminished capacity defense is belied by the fact that two justices of the Michigan Supreme Court concluded that the statute did no such thing. *Carpenter*, 627 N.W.2d at 241-42 (Kelly, J., dissenting) ("I disagree that the Legislature has signified its intent to preclude a defendant from negating mens rea by introducing evidence of mental illness short of legal insanity."). Justice Kelly, in a dissent joined by Justice Cavanaugh, found "unpersuasive" the majority's determination that the legislature, in codifying the defenses of insanity and guilty but mentally ill, intended to abolish the diminished capacity defense, noting that concerns "that the accused who successfully show that their mental illness negated the requisite mens rea may be set free without treatment or imprisonment . . . cannot justify reading into legislation a rule of exclusion per se *where none exists*." *Id.* at 291 (emphasis added); *see also id.* at 292 (calling the majority's holding an "extreme step" that "lacks sound justification").

It cannot reasonably be said that the statute "unambiguously" abolished the diminished capacity defense where (1) the Supreme Court – twenty-six years after its enactment – granted leave to appeal to determine *not* whether the defense still existed, but rather which party bears the burden of proving or disproving this defense that the Court assumed to exist; (2) the justices of the Michigan Supreme Court all read the same language and two of them concluded

that the statute effected no such change; and (3) Michigan trial courts, as well as its Court of Appeals and Supreme Court, consistently assumed the existence of this defense in the decades following the enactment and amendment of the codification of the insanity defense.[3] Against this backdrop, it was objectively unreasonable for the Michigan Court of

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[3] As the Sixth Circuit correctly recognized, until *Carpenter* was decided, the right of an accused to present evidence of diminished capacity was acknowledged *without question* in Michigan's appellate courts both prior to, *People v. Griffin*, 444 N.W.2d 139 (Mich. 1989); *People v. Ramsey*, 375 N.W.2d 297 (Mich. 1985); *People v. Lipps*, 421 N.W.2d 586 (Mich. Ct. App. 1988); *People v. Jones*, 390 N.W.2d 189 (Mich. Ct. App. 1986); *People v. Denton*, 360 N.W.2d 245 (Mich. Ct. App. 1984); *People v. Linzey*, 315 N.W.2d 550 (Mich Ct. App. 1981); *People v. Hall*, 269 N.W.2d 476 (Mich. Ct. App. 1978); *Mangiapane*, 271 N.W.2d 240; *Lynch*, 208 N.W.2d 656, and after the date of Respondent's offense, *People v. Lloyd*, 590 N.W.2d 738 (Mich. 1999); *People v. Pickens*, 521 N.W.2d 797 (Mich. 1994); *Mette*, 621 N.W.2d 713, and cases cited therein. The existence of a Michigan accused's right to offer evidence of diminished capacity was also recognized in *Johnigan v. Elo*, 207 F. Supp. 2d 599, 610 (E.D. Mich. 2002). The right to present evidence of diminished capacity was so well established in Michigan law that it was the subject of a standard criminal jury instruction, Mich. Crim. Jury Instructions 6.3, an instruction given to the jury at Respondent's first trial in this very case. While the standard criminal jury instructions in Michigan are not promulgated by the Supreme Court and their use is not mandatory, they are and for decades have been widely relied on by trial judges, prosecutors and defense attorneys throughout the state. Moreover, when the Legislature amended the insanity statute in 1994, it still made no reference to the diminished capacity defense. If the Michigan courts had been misconstruing the Legislature's intent in the nineteen years since it first enacted the insanity statute, it is likely that the Legislature would have clarified its intent when amending the statute in 1994 if not earlier.

Appeals to hold that the insanity statute was unambiguous in reflecting legislative intent to abolish the diminished capacity defense.

Moreover, contrary to amici's argument, the Sixth Circuit did not invade the province of the states to determine state law. Whether retroactive application of the judicial abolition of a common law defense violates due process is a question properly before the federal courts. Indeed, that is precisely the issue that the federal courts considered in *Rogers*; *see also, e.g.*, *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam) (trial court's construction of the term "arrest" as including a traffic citation under state law, and application of that construction to defendant to revoke his probation, was unforeseeable and thus violated due process).[4] Respondent did not ask the district court and

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[4] The State cites *Parker v. Matthews*, 132 S. Ct. 2148 (2012), in support of its curious argument that this Court should grant certiorari in this case because it has, in other cases and on other facts, reversed Sixth Circuit grants of the writ of habeas corpus. Notably, however, *Parker* supports exactly the opposite argument that amici propose here. In *Parker*, the Sixth Circuit had determined that the defendant's due process rights were violated when a state supreme court retroactively applied a post-offense judicial determination that the defendant bears the burden proving extreme emotional disturbance (whereas, previously, the defendant bore the burden of production, after which the state bore the burden of disproving extreme emotional disturbance), where that determination was deemed to be an unexpected and indefensible judicial revision of the state law. *Id.* at 2151. This Court noted that the state supreme court's reliance on the post-offense determination and its assessment of the sufficiency of the evidence according to that determination "would be relevant if they formed the sole basis" for the state supreme court's denial of the petitioner's claim. *Id.* However, because the jury instructions had

the Sixth Circuit – and is not now asking this Court – to determine whether the Michigan courts' interpretation of the effect of the insanity statute (or its amendment) on the diminished capacity defense was correct. Such an inquiry is decidedly outside the scope of proper inquiry of the federal courts. *See, e.g.*, *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). Instead, what Respondent properly sought, and what the Sixth Circuit performed, is a review of whether the Michigan courts' retroactive application of that interpretation violated his federal due process rights, an inquiry that is emphatically the within the province of the federal courts. *See id.*; *see also Rogers*, 532 U.S. 451 (reviewing whether state court's retroactive application of abolition of state common law "year and a day" rule violated due process); *Bouie*, 378 U.S. 347 (reviewing whether state court's retroactive application of new construction of state law violated due process).

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allocated the burden as required under the pre-offense state of law, and because the state supreme court determined that the evidence was sufficient to support the jury's finding under that law, "it [was] irrelevant that the court also invoked a ground of questionable validity." *Id.* at 2152. Thus, *Parker* supports the proposition that the federal courts may and should inquire into a state court determination that retroactive application of a change in state law does not offend due process. The difference between the instant case and *Parker* is simply that, in *Parker*, the state court determination was also supported by an independent basis that did not rely on the "ground of questionable validity" presented here.

The amici apparently submit that, so long as a state court claims that its decision does not represent "new" law – even if, as Chief Judge Batchelder recognized in her dissenting opinion below, that characterization is "illogical" (Pet. App. 30a) and entirely unsupported by its own history and precedent – the decision is beyond federal court review. Such a crabbed interpretation of the ability to vindicate due process rights via the writ of habeas corpus cannot be correct; it cannot be the case that the state courts can avoid federal court review of federal constitutional claims by the simple expedient of claiming that an unexpected and unforeseeable change in state law actually effected no change in state law. The Supremacy Clause of the United States Constitution demands otherwise. U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . , shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."). If the Supremacy Clause is to mean anything, it must mean that a state cannot ignore federal constitutional rights by such judicial sleight of hand.

THE SIXTH CIRCUIT DECISION DOES NOT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS

Despite the strained efforts of amici to manufacture a circuit split, none exists. *Warren v. Kyler*, 422 F.3d 132 (3d Cir. 2005), and the Supreme Court decision upon which it relied, *Fiore v. White*, 531 U.S. 225 (2001), address the entirely distinct issue of whether a *favorable* change in state law is *required* by the United

States Constitution to be applied retroactively. The amici's attempt to compare that entirely distinguishable situation to the situation here presented – when a state is *permitted*, under the United States Constitution, to apply an *unfavorable* decision retroactively – is without basis. Here, the question is one of fair notice as required by the due process clause. Nowhere in *Warren* or *Fiore* does that concept arise.

Instead, the amici attempt to create a circuit split by misrepresenting the issue in this case as one of how federal courts are required to treat state court determinations about the retroactivity of changes in state law. But, as discussed above, the issue here is not one of state law, but rather whether and when changes in state law may, consistent with the United States Constitution, be applied retroactively to defendants whose offense predated that change in law. When the change in state law would favor the defendant, the question that arises is not whether the change was foreseeable and reasonable by reference to the previously existing state of state law – an inquiry that, by necessity, requires the federal courts to examine the state of state law. Instead, in *Warren*, because "[n]othing in the federal Constitution compels a State to apply its criminal decisions retroactively, and we lack the authority to review the State's own application of its retroactivity principles," the federal courts were without authority to pass judgment on the state court's determination that a favorable change in law did not apply retroactively. 422 F.3d at 141. This is quite obviously distinguishable from the situation here, where the federal Constitution *does* compel a state *not*

to apply certain criminal decisions retroactively and federal due process rights are plainly implicated.

The State appears to imply – without outright stating – that the Sixth Circuit opinion creates a circuit split with the Third Circuit's opinion in *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004). The purported conflict between these cases does not withstand analysis. First, *Ponnapula* arose not in the context of judicial changes in criminal law but rather statutory changes in civil immigration law. Second, the Third Circuit expressly rejected the notion that actual reliance must be established in order to find impermissible retroactivity under *Landgraf v. AFI Film Products*, 511 U.S. 244 (1994). Third, the State wrenches the phrase it quotes ("it would border on the absurd") from the rest of its context ("to argue that an alien would refrain from committing crimes or would contest criminal charges more vigorously if he knew that after he had been imprisoned and deported, a discretionary waiver of deportation would no longer be available to him," *Ponnapula*, 373 F.3d at 496 n.14) and instead attempts to make it stand for the far broader – and plainly incorrect – proposition that a defendant could *never* reasonably claim to have charted his course of conduct in reliance upon the state of law at the time he committed his offense. The State has presented no case that stands for that extremely broad, patently untenable proposition.

The Sixth Circuit decision does not conflict with *Warren* or *Ponnapula*; neither the State nor amici have identified any actual circuit split; and no circuit split exists.

THE STATE'S AND AMICI'S ARGUMENTS ARE INCONSISTENT WITH THIS COURT'S PRECEDENT

The State and its amici present a view of fair warning that is inconsistent with this Court's precedent and wholly out of step with the requirements and values of due process. In cases where there is no question of the defendant's mental capacity to understand the state of law, courts do not inquire whether that particular defendant actually did so understand. Instead, courts examine the state of law from an objective perspective. *See Bouie*, 378 U.S. at 355 n.5 ("We think it irrelevant that petitioners at one point testified that they had intended to be arrested. The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants."). *Cf. Stogner v. California*, 539 U.S. 607, 651 (2003) (Kennedy, J., dissenting) (noting that, in the criminal law context, the notion of reliance on state of law at time of offense is "for the most part, a fictional construct" insofar as the Court does not require a defendant to show that he or she, personally, relied upon state of law in deciding how to order his or her conduct).

Here, however, amici suggest that, in the case of defenses specific to individuals with arguably diminished mental capacities, courts should instead examine whether *this particular defendant* (or at least this particular type of defendant) actually possessed the mental capacity accurately to assess the state of

law prior to acting. Amici, in essence, propose removing the due process protection of "fair notice" or "fair warning" from individuals who lack the mental capacity to understand what they are being given notice or warning of. Stated another way, amici appear to be asking the Court to adopt a rule permitting retroactive application of a change in substantive law in a criminal case in which the defendant suffers from a mental, cognitive or psychological impairment even though retroactive application would be forbidden if the defendant suffered no such impairment.

This Court's precedents are clear: "All citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985). Amici, however, would have this Court create a novel but significant limitation to this axiom. By their reading, courts are to assume to that, while all fully and consistently mentally competent citizens are presumptively charged with knowledge of the law, anyone not so situated cannot be assumed to understand the law and thus cannot be deprived of due process when the law is suddenly and unexpectedly changed to their detriment. Nothing in this Court's precedents or in the values and principles underlying due process supports such an extreme and unjustified restriction of this fundamental right; the proposition does not warrant examination by this Court.

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: December 28, 2012

AMICUS CURIAE BRIEF

No. 12-547

IN THE
Supreme Court of the United States

LINDA METRISH, Warden,

Petitioner,

v.

BURT LANCASTER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, ARIZONA, DELAWARE, IDAHO, KANSAS, NEW MEXICO, UTAH AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether retroactive application of a State Supreme Court's rejection of a "diminished capacity" defense to premeditated murder represents an "unreasonable application" of this Court's due process precedents justifying habeas relief.

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INTEREST OF THE *AMICI* STATES[1]

The *amici* States have a compelling interest in ensuring that federal courts uphold criminal convictions absent state court rulings that are "contrary to or an unreasonable application of" this Court's precedents. They also have a more specific interest in defending their own courts' determinations of State law against federal court interference. Furthermore, as sovereign operators of the nation's front-line criminal justice systems, States have a compelling interest in maintaining flexibility in developing substantive criminal law standards, consistent with due process and other Constitutional protections.

The *amici* States' participation in this case arises from all three of these interests. The decision below invokes notions of "fair warning" to interfere with the Michigan judiciary's decision to apply retroactively its rejection of "diminished capacity" as an affirmative defense to a charge of premeditated murder. There is a logical disconnection, however, between a criminal defendant's asserted "diminished capacity" to form the specific intent necessary for premeditated murder, and the interests of "fair notice" that underlie the due process rule applied below. Accordingly, the *amici* States urge the Court to review how the Michigan Court of Appeals could

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[1] Pursuant to Supreme Court Rule 37.2(a), the *amici* States provided all parties' counsel of record with timely notice of their intent to file this brief. Consent of the parties is not required for the States to file an amicus brief. Sup. Ct. R. 37.4.

have committed an "unreasonable application" of *this* Court's due process precedents when interpreting *state law* affirmative defense precedents to support retroactive application of the diminished capacity defense rule.

SUMMARY OF THE ARGUMENT

The decision below invalidated the premeditated murder conviction of Burt Lancaster because he lacked "fair warning" before he killed his girlfriend that his supposed "diminished capacity" would not be a defense to prosecution. According to the Sixth Circuit, refusing to permit Lancaster to assert a diminished capacity defense that supposedly existed when he murdered Toni King burdened his right to due process, which "turns upon . . . the *appearance to the individual* of the status of state law as of that moment [when the crime was allegedly committed]." Pet. App. at 6a-7a (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (emphasis added)). The Sixth Circuit did not address whether, if such "fair warning" could possibly have impacted Lancaster's decision to kill King, he could nonetheless plausibly have suffered from the diminished mental capacity he asserted at trial.

On a basic level, that is, it makes no sense to apply the *Bouie* foreseeability test to a diminished capacity defense. Fair warning can be important in situations involving, for example, claims of self-defense, where a defendant might actually have

relied on knowledge of the law when deciding whether to use deadly force. But where, as is true here, such cognitive reliance would itself render the defense (lack of sufficient cognition) wholly inapplicable, there can be no due process concern.

Furthermore, the Sixth Circuit did not give the Michigan courts proper deference under AEDPA. Retroactivity is a matter of state law and is not subject to federal habeas review.

ARGUMENT

I. The Court Should Review Whether Retroactive Elimination of a "Diminished Capacity" Defense Can Constitute an "Unreasonable Application" of this Court's "Fair Warning" Due Process Precedents

In the decision below, the Sixth Circuit held that the Michigan courts committed an "objectively unreasonable application of clearly established United States Supreme Court precedent," namely *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Rogers v. Tennessee*, 532 U.S. 451 (2001). Pet. App. at 27a. *Bouie* and *Rogers* hold that, "[i]f a judicial construction of a criminal statute is *unexpected and indefensible* by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." *Bouie*, 378 U.S. at 354 (emphasis added and quotation omitted).

The due process right vindicated by *Bouie* and *Rogers* is "[t]he basic principle that a criminal statute must give *fair warning* of the conduct that it makes a crime . . . ." *Bouie*, 378 U.S. at 350-51 (emphasis added); *Rogers*, 532 U.S. at 459 (explaining that *Bouie*'s "rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning").

In the context of a diminished capacity defense, however, the *Bouie* standard makes little sense. If Burt Lancaster had truly suffered from diminished capacity at the time he killed Toni King, he would not have had the mental capacity to foresee that he could rely on the defense at trial. The diminished capacity defense "allows a defendant, even though legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime." *Michigan v. Carpenter*, 627 N.W.2d 276, 280 (Mich. 2001). A person who does not possess the mental capacity necessary for premeditation of murder cannot have the mental capacity to forecast whether that incapacity may be a defense to prosecution. Yet the decision below premised its decision on precisely that fantastical conceit. Pet. App. at 23a ("Lancaster could not have reasonably foreseen in 1993—when his crime was committed—that the consistent line of Michigan Court of Appeals' decisions upholding the diminished-capacity defense would have been overturned before his retrial in 2005.").

The specific circumstance of a diminished capacity defense consequently eliminates the primary rationale—to require "fair warning"—for applying *Bouie*. This is in stark contrast with more traditional affirmative defenses, such as self-defense and coercion, which criminal defendants might more plausibly consider when choosing to engage in the conduct the State nonetheless charges as a crime. For example, if "Jane Doe chooses to kill John Smith when he threatens her with substantial bodily harm or death[,] Doe has a right to rely on the representation of her state legislature that her conduct is legal. If the State then were to . . . not permit her to plead self-defense, [that denial] undoubtedly would violate principles of fundamental fairness." *Gilmore v. Taylor*, 508 U.S. 333, 359 (1993) (Blackmun, J., dissenting). Similarly, a defendant who is compelled to abet a murder must be able to invoke that defense if the law at the time did not give him notice that the defense was unavailable. *United States ex rel. Reed v. Lane*, 759 F.2d 618, 623-24 (7th Cir. 1985). In both cases, the nature of the defense does not inherently negate the defendant's capacity to consider the law.

Indeed, this Court and lower courts have distinguished situations where *Bouie* is inapplicable because notice is unwarranted or unhelpful. In *Bradshaw v. Richey*, 546 U.S. 74, 74-75 (2005) (per curiam), the defendant committed arson in an attempt to kill his former girlfriend and her new

boyfriend, but only a neighbor's daughter died in the fire. This Court upheld the conviction for aggravated felony murder on a theory of transferred intent against a *Bouie* due process claim in part because the Court opined that "[i]t is doubtful whether this principle of fair notice has any application to a case of transferred intent, where the defendant's *contemplated* conduct was *exactly* what the relevant statute [*sic*] forbade[.]" *Id.* at 76-77 (citation omitted).

The Ninth Circuit has similarly demarcated, in *Gonzalez v. Wong*, 667 F.3d 965, 997 (9th Cir. 2011), a zone where "[a]pplying *Bouie* [] would not further the principle underlying that decision." There, the Ninth Circuit rejected a murder defendant's claim that he lacked "fair notice" that, notwithstanding the invalidity of the search warrant the victim-police officer was attempting to serve when he was murdered, a trial court would instruct jurors to infer that the officer was engaged in the "lawful pursuit of his duties." *Id.* at 971-73. The court dismissed as irrelevant whether the defendant had "fair notice" such an instruction would be given under those circumstances because "[a]n individual who sees an officer serving a warrant would not ordinarily know at the time that the warrant was not valid." *Id.* at 997.

It is reasonable, therefore, to declare that *Bouie* is inapposite where a defendant has sought to plead diminished capacity but was denied such an

opportunity based on retroactive application of a rule. Analogous to *Bradshaw* and *Gonzalez*, this case presents the scenario where providing "fair warning" would engender no relief. A person with mental capacity so diminished that he cannot premeditate the murder he commits could not possibly benefit from notice that his condition is not a defense. Such a person is by definition out of mental control, and due process surely does not require courts to afford a criminal defendant the benefit of a hypothetical mental state at war with the defendant's own contentions.

At the very least, it surely was not unreasonable in light of this Court's precedents—not only *Bouie* and *Rogers*, but also *Bradshaw*—for the Michigan Court of Appeals to eschew an understanding of due process that allows Lancaster to prove insufficient mental capacity to commit premeditated murder on the assumption that he was perfectly lucid when he killed his victim. But this is exactly the logic of the Sixth Circuit, whose understanding of this Court's due process precedents led it to focus on whether Lancaster could have "reasonably foreseen" when he committed his crime that there would be no diminished capacity defense available at his trial. Pet. App. at 23a.

Even setting aside the unlikely scenario where a *compos mentis* Burt Lancaster methodically appraises the legal landscape before deciding whether to kill Toni King, the supposition that an

addled Lancaster might have done so, and decided to proceed only once he read the teachings of the Michigan appellate courts on diminished capacity, is farcical. Not only that, but even indulging in this thought experiment—which is necessary for Lancaster to prevail on his due process claim—could only confirm that Lancaster acted with *exactly* the calculation and premeditation he was convicted of having.

In no event were Lancaster's due process rights violated by the retroactive application of Michigan's *Carpenter* decision. Certiorari should be granted either because the *Bouie* foreseeability test does not even apply in cases involving the rejection of a diminished capacity defense, or because, given the Court's holding in *Bradshaw* that lack of prejudice from retroactivity counts, it was not clearly established that *Bouie* should apply here. For if it was not clearly established that *Bouie* should even apply, the Michigan Court of Appeals cannot be faulted for (allegedly) applying it incorrectly.

II. In the Alternative, the Court Should Review Whether, Under AEDPA, Federal Courts May Decide that State Court Elimination of an Affirmative Defense Was "Unexpected and Indefensible" in Light of State Precedent

Even assuming that Lancaster may generally maintain a *Bouie* claim pertaining to the elimination of a diminished capacity defense, the Court should take this case to address an important AEDPA issue. The decision below holds that the determination whether the elimination of a state criminal defense was foreseeable under state law is a *federal* law question, and that holding is in tension with holdings from the Third Circuit and this Court.

Here, again, the Michigan Court of Appeals held that the Michigan Supreme Court's holding in *Carpenter* that the defense of "diminished capacity" did not exist was not a change in the law precluding retroactivity. Pet. App. at 76a-77a. Rather than defer to this seeming state law determination, however, the Sixth Circuit analyzed the state court cases and found that "the district court materially understated the 'foothold' that the diminished-capacity defense had established in Michigan law and failed to recognize the plethora of state appellate court cases recognizing the validity of the defense." Pet. App. at 8a.

In dissent, Chief Judge Batchelder stated that "[i]n concluding that *Carpenter* did not constitute a change in Michigan law, the [Michigan] court of appeals applied Michigan state law; it did not apply *Bouie*, *Rogers*, or any other Supreme Court precedent." Pet. App. at 30a (Batchelder, C.J., dissenting). Thus, said the Chief Judge, even if the Michigan court's decision were somehow "illogical," such "conclusion is not relevant to our review because it was based on state, not federal, law." Pet. App. at 30a-31a (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.")). The Michigan Court of Appeals' decision, therefore, should have been given "the benefit of the doubt required under AEDPA's highly deferential standard[.]" Pet. App. at 30a.

The Third Circuit, in contrast with the panel majority below, has suggested that state law retroactivity questions leave nothing for federal courts to review in a habeas proceeding where the issue is the status of state law at the time of the crime. In such a context, that court deferred to "the Pennsylvania courts' application of their own established retroactivity doctrines. On habeas review we are in no position to second-guess the state courts' determination as to that state law issue." *Warren v. Kyler*, 422 F.3d 132, 137 (3d Cir. 2005). The court relied on the "Supreme Court's longstanding position that 'the federal constitution

has no voice upon the subject' of retroactivity." *Id.* at 136 (quoting *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932)).

To be sure, in *Warren* the relevant intervening state court decision was favorable to the defendant, and the question was whether due process *required* the State to apply it to the defendant. Regardless, the court deferred to the state court's retroactivity determination even though it had consequences for the federal due process question. That decision, in turn, was based on this Court's holding in *Fiore v. White*, 531 U.S. 225, 228 (2001) (per curiam), which relied on a state court assessment of the retroactive application of an intervening decision to conclude that due process was not at issue.

Yet in both the "requires" context (*Warren* and *Fiore*) and the "permits" context (this case), the threshold retroactivity determinations rested on how to apply state law doctrine. In *Warren* and *Fiore*, the question was whether, under state law, the intervening decision actually represented a new rule, or whether it was instead simply a "clarification" of an old rule. *Warren*, 422 F.3d at 137; *Fiore*, 531 U.S. at 228. Here, similarly, the threshold question was whether the intervening decision represents a departure from precedent or merely clarifies extant principles. *See* Pet. App. at 8a. And while it may seem unexceptional in the abstract for federal due process doctrine to look more favorably upon state court *refusals* to apply intervening decisions

retroactively, AEDPA deference to state court resolutions of threshold state law questions should be the same regardless of the outcome.

With regard to the decision below, therefore, the net result is both inter-circuit tension and tension with this Court over the point at which a state law retroactivity determination becomes a federal question. This tension is all the more significant given the history of the particular intervening rule at stake, namely the elimination of the diminished capacity defense.

The Court has previously observed that the availability *vel non* of a diminished capacity defense is particularly a question of *local* law. *See Fisher v. United States*, 328 U.S. 463, 473 (1946) (affirming under District of Columbia law that "an accused in a criminal trial is not entitled to an instruction based upon evidence of mental weakness, short of legal insanity, which would reduce his crime from first to second degree murder"). Indeed, the diminished capacity defense represents such "a radical departure from common law concepts" that it could only be "a matter peculiarly of local concern." *Id.* at 476. *See also Powell v. Texas*, 392 U.S. 514, 536 (1968) (questions relating to the mental state necessary to be guilty of a crime have "always been thought to be the province of the States."); *Clark v. Arizona*, 548 U.S. 735, 779 (2006) (holding that the availability of a diminished capacity defense is a

matter of state prerogative, not federal constitutional law).

The point is that, while some defenses have roots in the common law and are therefore culturally understood to be available in the vast majority of states, the defense of diminished capacity is a state-specific defense—one rejected by many states at that. Pet. App. at 33a. It does not possess the renown and longevity essential for its denial amidst murky state law precedent to offend the due process principle of "fair warning." As a consequence, a state court determination that it was foreseeable that the State would reject a diminished capacity defense warrants all the more deference. Review should be granted here to clear up whether state law retroactivity, which depends on the foreseeability of a new state law rule, is a state or federal issue under AEDPA.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

LINDA METRISH, Warden, Petitioner,

v.

BURT LANCASTER

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief of Wayne County, Michigan as Amicus Curiae in Support of Petitioner

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Question Presented

I.

1. Whether the Michigan Supreme Court's recognition that a state statute abolished the long-maligned diminished-capacity defense was an "unexpected and indefensible" change in a common-law doctrine of criminal law under this Court's retroactivity jurisprudence. See *Rogers* v. *Tennessee*, 532 U.S. 451 (2001).

***2. Whether the Michigan Court of Appeals' retroactive application of the Michigan Supreme Court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" so as to justify habeas relief. *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011).**

*Amicus will address only question 1.

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within her jurisdiction, has a vital interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits Amicus to file a supporting brief without permission of the parties. No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing.

Summary of Argument

There has never been a statutory defense of "diminished capacity" or "partial responsibility" caused by mental retardation or mental disease in Michigan, nor has the Michigan Supreme Court ever recognized such a defense. For a time, the Michigan Court of Appeals held that, as a matter of "materiality and relevancy," expert testimony was competent at trial on the issue of whether specific intent had been proven when the offense charged has an element of specific intent. After Michigan codified the insanity defense, the Michigan Court of Appeals held that this rule of evidentiary competency was subsumed within the statutory scheme, requiring notice and submission to examination, but still—mistakenly—allowed this form of proof as going to specific intent rather than to the defense of insanity as defined in statute. But the Michigan Supreme Court never adopted this rule of evidentiary competency.

In holding that there is no such rule of evidentiary competency, at least after the legislative codification of the insanity defense in 1975, the Michigan Supreme Court overruled none of its prior decisions, disapproving only of Michigan Court of Appeals decisions. Because only decisions from an intermediate court were disapproved, there was no "law changing" decision cognizable under due process.

Further, the Michigan Supreme Court in no way changed or redefined the elements of the offense in rejecting the rule of evidentiary competency of expert testimony on the issue of specific intent. Nor did that decision change the quantum of proof

required to convict. Respondent was thus in no way denied fair notice of that conduct which constituted the offense charged.

Argument

A. There Was Never An Established Common-Law Or Statutory Defense of Diminished Capacity Based On Mental Disease or Defect in Michigan

(1) The common law and criminal offenses and defenses in Michigan

The law made by judges at the common law was made under the sovereign authority of the king. Though the judges "made law" under the fiction of "discovering" it in immutable or natural principles, they did not discover the law by finding it in any source outside themselves, such as a written constitution. The law thus made—precedent—was binding on future similar cases, or else it could not be called law at all. Judges plainly had the lead role in creating substantive law, necessarily making policy decisions that would today unquestionably be viewed as legislative. But things changed—"a trend in government that has developed in recent centuries, called democracy."[1] Our form of government includes the principle of separation of powers, quite clearly designed, in part, to keep law making out of the hands of judges: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge*

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[1] Scalia, *A Matter of Interpretation* (Princeton University Press: 1997), p.9.

would then be *the legislator*."[2] In a constitutional democracy judges no longer should play a role regard to creating or altering substantive "common law."

In Michigan, the notable Justice Campbell stated long ago that "[w]hatever elasticity there may be in civil matters, it is a safe and necessary rule that criminal law should not be tampered with except by legislation."[3] Some penal statutes in Michigan employ terminology with an understood common-law meaning, without elaboration or further definition, and it has long been settled that when the legislature in enacting a statute simply employs a common-law term with a well understood and recognized meaning, the "legislature intended no alteration or innovation of the common law not specifically expressed"; indeed, "it is never to be presumed that the Legislature intended to make any innovation upon the common law any further than the case absolutely require(s) in order to carry the act into effect."[4] This principle applies in criminal cases, for once the common-law definition of a term has been determined, then where "the legislature (shows) no disposition to depart from the common-law definition, . . it

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[2] *The Federalist* No. 47, at 326 (Madison)(Jacob E. Cooke, ed. 1961) (emphasis in the original).

[3] 61 Mich. at 109-110.

[4] *Wales v Lyon*, 2 Mich. 276, 283 (1851). See also *Garwols v Bankers Trust*, 251 Mich. 420, 232 N.W. 239 (1933).

remains."[5] The use of a common-law term without alteration is as much an *enactment* of the meaning of that term into statutory law as if the legislature had spelled out the common-law meaning in detail in the statute, and the judiciary, of course, is not free to amend a statute.

This principle applies as much to common-law defenses as penal statutes employing common-law terms. In *People v Riddle*[6] the court considered whether the self-defense "no-retreat" rule when one is assaulted in his or her dwelling extends to the curtilage, concluding that it did not, the rule extending only to the structure and attached appurtenances.[7] The court stated that "because our Legislature has not acted to change the law of self-defense since it enacted the first Penal Code in 1846, *we are proscribed from expanding or contracting the defense as it existed at common law.*

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[5] *People v Schmitt*, 275 Mich. 575, 267 N.W. 741 (1936). See also *People v Utter*, 217 Mich. 74, 185 N.W. 830 (1921); *People v Potter*, 5 Mich 1 (1858).

The same rule holds true federally: "'[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Neder v United States*, 527 U.S. 1, 3, 119 S.Ct. 1827, 1831 (1999).

[6] *People v Riddle*, 467 Mich. 116, 649 N.W.2d 30 (2002).

[7] In the "Self-Defense Act" of 2006 the Michigan legislature changed this rule statutorily.

We therefore apply the common law as it was understood when the crime of murder was codified to clarify the concepts of retreat and the castle doctrine."[8] In short, then, there is no "common law of crimes" in Michigan; there are only statutory crimes, with the definition of some terms in the statutes being found in the common law, but still as unalterable by the judiciary as if the legislature had spelled out the definitions chapter and verse.[9] And the same is true as to defenses established at the common law.

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[8] 467 Mich. at 126, 649 N.W.2d at 38 (emphasis supplied).

[9] It is true that Michigan has a "catch-all" statute, which makes criminal all offenses at the common law that are not otherwise covered by a specific statute. But this statute itself, MCL 750.505, *enacts* those offenses into law, so that the role of the judiciary is to discover them, the judiciary having no authority to *modify* them. As Justice Campbell said long ago, " . . while we have kept in our statute-books a general statute resorting to the common law for all non-enumerated crimes, there has always been a purpose in our legislation to have the whole ground of criminal law defined, as far as possible by statute. There is no crime whatever punishable by our laws except by virtue of a statutory provision." *In re Lamphere*, 61 Mich. 105, 108, 27 N.W. 882 (1886).

(2) A *defense* of diminished capacity apart from the defense of insanity has never been established law in Michigan, there being, at best, a principle of evidence regarding crimes with an element of specific intent

If a common-law defense of diminished capacity or "partial responsibility" existed in Michigan based on mental disease or defect, it is remarkable that no reference was made to it for almost one hundred and two score years after Michigan's statehood. Michigan had no statutory scheme concerning the defense of insanity until 1975. Until that time, then, the common-law understanding prevailed:

> Before 1975, the test for determining legal insanity in Michigan was controlled by *People v. Durfee*, 62 Mich. 487, 29 N.W. 109 (1886). the "salient elements" of the *Durfee* test were: "1) whether defendant knew what he was doing was right or wrong; and 2) if he did, did he have the power, the will power, to resist doing the wrongful act?"[10]

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[10] People v. *Shahideh*, 482 Mich. 1156, 1160, 758 N.W.2d 536, 540 (2008). And the predicate for the application of these principles was mental disease or defect, as the "*Durfee* test, in turn, was based in part on the *M'Naghten* rule: '[A]t the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or,

There is nothing in the Michigan jurisprudence of the common-law insanity defense that even hints at a defense of diminished capacity or "partial responsibility" before 1973. This is not surprising, as there was no such defense at the common law:

> No one doubts that there are more possible classifications of mentality than the sane and the insane It may be that psychiatry has now reached a position of certainty in its diagnosis and prognosis which will induce Congress to enact the rule of responsibility for crime for which petitioner contends. For this Court to force the District of Columbia to adopt such a requirement for criminal trials *would involve a fundamental change in the common law theory of responsibility.*[11]

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if he did know it, that he did not know he was doing what was wrong.' " *People v. Carpenter*, 464 Mich. 223, 234, 627 N.W.2d 276, 282 (2001).

[11] *Fisher v. United States*, 328 U.S. 463, 475-476, 66 S.Ct. 1318, 1324 - 1325 (1946) (emphasis supplied).

See also *State v. Wilcox*, 436 N.E.2d 523, 533 (Ohio, 1982): " . . the diminished capacity theory forcefully challenges conventional concepts of culpability and "involve(s) a fundamental change in the common law theory of responsibility." . . '"(w)e conclude that the potential impact of concepts such as diminished capacity or partial insanity—however labeled—is of a scope and magnitude which precludes their proper adoption by an expedient modification of the rules of evidence. If such principles are to be incorporated into our law of criminal

In 1973, before the codification of the insanity defense by the Michigan legislature in 1975, an intermediate Michigan appellate court decision first raised the notion of "diminished capacity," but the case concerns not the recognition of some new defense but a *principle of evidence*. That court in *People v Lynch*[12] considered a first-degree murder conviction of the mother of a newborn child that had been starved to death. No insanity notice was filed, nor any insanity defense offered. The defense was not permitted to present expert testimony on the issues of premeditation and intent to the effect that the defendant had "a history of unfortunate childhood experiences, an insecure marriage, a dull normal intelligence, a feeling of chronic rejection, suggestibility, a marked impairment of ability to understand or comprehend and apprise the immediate and future consequences of her actions, and that all of these deficiencies would increase under stress."[13] Though recognizing that some jurisdictions had rejected the admission of such evidence, the court held that this "medical proof, sometimes called proof of diminished or partial responsibility," should be admitted, at least where

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responsibility, the change should lie within the province of the legislature." See similarly *State v. Thompson* 695 S.W.2d 154, 158 (Mo.App. S.D. 1985).

[12] *People v Lynch*, 47 Mich.App 8, 208 N.W.2d 656 (1973).

[13] 47 Mich.App at 14, 208 N.W.2d at 659.

a specific intent is required to be proven.[14] But the matter was entirely one of the law of evidence, the court considering whether the excluded testimony was material and relevant,[15] finding that it was, and reversing because of its exclusion on the issue of specific intent: "The proposed testimony of Drs. Willis and Basel being material and relevant, and there appearing to be no good reason in law or public policy for excluding the same, the matter is reversed for new trial."[16]

But in 1975 the Michigan legislature codified the common-law defense of insanity, providing, as part of a comprehensive scheme, that:

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[14] 47 Mich.App at 20, 208 N.W.2d at 662. The court remarked also "That such testimony may be drawn from a new and evolving discipline of medical-behavioral science does not alter the basic evidentiary rules. Nor, if it did, would the fact that such testimony was previously unknown to the state's jurisprudence be a reason for excluding it." 47 Mich.App. at 21, 208 N.W.2d at 663.

[15] "Is there a good reason for admitting testimony of this nature? . . . *The question involves tests of materiality and relevance*. That the offered testimony was material cannot be doubted in view of the definition of murder as an intentional killing, and the statutory definition of first-degree murder as that murder which is willful, deliberate, and premeditated. Nor can it be doubted that such evidence is relevant, that is, of some probative value, to the material element of intent." 47 Mich.App at 16, 662 N.W. 2d at 660 (emphasis supplied).

[16] 47 Mich.App. at 22, 208 N.W.2d at 663.

> (1) A person is legally insane if, as a result of mental illness as defined in section 400a of Act No. 258 of the Public Acts of 1974, being section 330.1400a of the Michigan Compiled Laws, or as a result of mental retardation as defined in section 500(g) of Act No. 258 of the Public Acts of 1974, being section 330.1500 of the Michigan Compiled Laws, that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.[17]

Soon after, the Michigan Court of Appeals held that the legislature had thereby manifested "an intention to bring under one procedural blanket all defenses to criminal charges that rest upon legal insanity as defined in the statute."[18] The court concluded that "the defense known as diminished capacity comes within this codified definition of

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[17] MCL 786.21a(1). The statute was amended in 1994 to place the burden of persuasion on the defendant by a preponderance of the evidence. 1994 Public Acts, No. 56. Before that time, though the prosecution had the burden of proof of sanity beyond a reasonable doubt, sanity was *not* considered an element of an offense; rather, the defense was a burden-shifting affirmative defense, the prosecution's duty of proof only arising upon the presentation by the defense of some competent evidence of insanity. *In re Certified Question*, 425 Mich. 457, 467, 390 N.W.2d 620, 624 (1986).

[18] *People v. Mangiapane*, 85 Mich.App. 379, 394-395, 271 N.W.2d 240, 248 (1978).

legal insanity," so that, though evidence on the issue of the defendant's capacity to form any specific intent required by the statute was still admissible, it was admissible only if the defendant complied with the statutory requirement of filing a notice of insanity, as well as all other statutory requirements regarding the defense.[19] But despite the statutory definition of insanity—that, as a result of mental disease or mental retardation the accused lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law—and inconsistent, then, with its terms, the opinion continued to allow expert testimony on the question of whether the accused entertained specific intent where the crime charged contained that element. In short, the evidentiary rule of *Lynch* continued, but constrained by the procedural requirements of Michigan's codified insanity-defense scheme.

It has been the law in Michigan for well over a century that a point assumed in an opinion without specific consideration is not considered to have been decided.[20] In *none* of the Michigan Supreme

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[19] 85 Mich.App at 395, 271 N.W.2d at 279.

[20] "A point thus assumed without consideration is, of course, not decided." *Allen v. Duffy*, 43 Mich. 1, 11, 4 N.W. 427, 434 (1880). See also *In re Apportionment of State Legislature--1982*, 413 Mich. 96, 113-114, 321 N.W.2d 565, 571 (1982): "The Court's actions . . taken without addressing or definitively considering fundamental questions, are not precedentially binding for it is well-established in this state that '[a] point thus

Court cases cited by the Sixth Circuit opinion did the Michigan Supreme Court give specific consideration to whether a diminished-capacity *defense* existed in Michigan either before or after the legislature's codification of that defense, and in none did that court ever approve of the evidentiary rule of the *Lynch* case, as continued but constrained in *Mangiapane*. In *People v Ramsey*,[21] the issue specifically considered was whether the creation of the verdict of "guilty but mentally ill" violated due process.[22] The majority opinion of the Sixth Circuit here mistakenly takes a quotation by the majority from a treatise, including language concerning "partial responsibility," in its rejection of the constitutional challenge to the guilty but mentally ill verdict, as an "acknowledge[ment] of the substantive components of the diminished-capacity defense," leaving "open" only "whether, and to what degree, the defense would apply to a general-intent crime like second-degree murder."[23] But the quotation is scarcely a holding or acceptance of the diminished-capacity defense as a part of Michigan law, and indeed, the Michigan Supreme Court opinion said only that "while his mental illness *may be* a consideration *in evaluating*

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assumed without consideration is of course not decided.'"

[21] *People v Ramsey*, 422 Mich. 500, 375 N.W.2d 297 (1985).

[22] 422 Mich. at 510, 375 N.W.2d at 300.

[23] *Lancaster v. Metrish*, 683 F.3d 740, 747 (CA 6, 2012).

the requisite state of mind for the crime charged, we decline to accept Ramsey's invitation to hold that a finding of mental illness negates malice aforethought as a matter of law."[24]

People v Fernandez,[25] also cited by the Sixth Circuit majority, is even more beside the point. The issue was whether conviction of conspiracy to commit first-degree murder "requires a mandatory nonparolable life sentence . and whether conspiracy to commit second-degree is a lesser included offense. "[26] The case had nothing to do with insanity or diminished-capacity defenses. The court found that no instruction on conspiracy to commit second-degree murder was required because, even if that offense were hypothetically possible, no facts supported it. The court observed in passing that California allowed that the offense could exist because of the possibility of "diminished capacity." But the California opinion quoted[27] by

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[24] 422 Mich at 518, 375 N.W.2d at 304 (emphasis supplied). Ramsey was convicted of second-degree murder..

[25] *People v Fernandez*, 427 Mich. 321, 398 N.W.2d 311 (1986).

[26] 427 Mich. at 323, 398 N.W.2d at 312.

[27] The instruction quoted referred repeatedly to intoxication; "if the defendants, due to diminished capacity caused by intoxication, did not have the capacity to form the mental state necessary to premeditate murder, they cannot be found guilty of conspiracy to commit first degree murder, but may be

the Michigan Supreme Court was not considering the "partial responsibility" insanity defense of diminished capacity, but the defense of *intoxication*, which is also, unhelpfully, often referred to as "diminished capacity." When the Michigan Supreme Court thus said that "While the California rule of the effect of diminished capacity on degrees of homicides varies significantly from the Michigan rule, see *People v Langworthy*, 416 Mich 630, 331 N.W.2d 171 (1982) (voluntary intoxication only negates specific intent, not general intent), the possibility exists under Michigan law that diminished capacity might possibility militate for the existence of the charge of conspiracy to commit second-degree murder. We do not rule on this question. "[28] it was not referring to diminished capacity/insanity, but evidence of intoxication—and even then holding nothing as to its applicability. And the principle under discussion was actually an *evidentiary* one; that is, the admissibility of certain evidence on the question of specific intent.

Nor does any other Michigan Supreme Court case cited by the majority opinion below specifically consider whether diminished capacity falls within the Michigan statutory scheme concerning the

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found guilty of conspiracy to commit second degree murder." Quoted at 427 Mich. at 342, 398 N.W.2d at 320.

[28] 427 Mich. at 342, 398 N.W.2d at 320.

insanity defense. *People v Griffin*[29] is simply an order remanding for an evidentiary hearing as to whether trial counsel was ineffective in not "exploring" the defenses of diminished capacity and insanity." This cryptic order hardly establishes the defense in Michigan as a part of the insanity defense (and, for all one knows, could have been referring to intoxication). And in *People v Pickens*[30] the court said only that counsel was not ineffective in presenting a defense of lack of premeditation and diminished capacity, which is not a holding that diminished capacity is a recognized form of insanity defense in Michigan.

The *Carpenter*[31] decision, the first Michigan Supreme Court decision to directly confront the question, and rejecting the admission of expert testimony on the issue of specific intent, makes clear that the Michigan Supreme Court had never before that time found that a diminished-capacity "defense" exists in Michigan: "This Court has several times acknowledged in passing the concept of the diminished capacity defense. . . . *However, we*

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[29] *People v Griffin*, 433 Mich. 880, 444 N.W.2d 139 (1989).

[30] *People v Pickens*, 446 Mich. 298, 521 N.W.2d 797 (1994).

[31] *People v Carpenter*, 464 Mich. 223, 627 N.W.2d 276 (2001).

have never specifically authorized its use in Michigan courts."[32]

The Michigan Supreme Court, then, before *Carpenter*, had never held that "diminished capacity" exists in Michigan either as part of the common law, before enactment of the statutory scheme, or as part of the statutory scheme. And uses of this term in Michigan opinions went to the admissibility of expert testimony on proof of specific intent, not to a true "defense." In concluding that a defense was established in Michigan through the passing references to it by the Michigan Supreme Court, and through statements by the Michigan Court of Appeals, the Sixth Circuit majority opinion "chewed more than it bit off."[33] The most that can be said is that in 1973 the Michigan Court of Appeals held that expert testimony was admissible on the question of whether the accused entertained a required specific intent, and in 1975 that court constrained that ruling by finding that the codification of the insanity defense by the legislature had occupied the field, so that the statutory procedural requirements

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[32] 464 Mich. at 233, 627 N.W.2d at 281 (emphasis supplied).

[33] Allegedly said by Mrs. Henry Adams, referring to Henry James.

It should also be noted that the Michigan Standard Jury Instructions, referred to by the Sixth Circuit majority, are not only not "law," they are not even mandatory in Michigan. *People v. Petrella*, 424 Mich. 221, 277, 380 N.W.2d 11 (1985).

were prerequisites to the admissibility of the evidence, though expert testimony on specific intent remained admissible, despite the statutory definition of insanity.

(3) Because the Michigan Supreme Court disapproved only of intermediate court decisions, which were inconsistent with the statutory text of Michigan's insanity-defense scheme, no "change" in law occurred with the decision in *People v Carpenter*

At the time defendant committed the murder here, then, a statutory scheme existed which defined insanity as when, as a result of mental disease or mental retardation, the accused lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. A successful defense resulted, under the statute, in a verdict of "not guilty by reason of insanity," which triggered a diagnostic commitment.[34] There was also an intermediate appellate court decision, finding that the statutory scheme occupied the field, but stating, nonetheless, that expert testimony as to whether the accused was capable of forming a required specific intent—a question of the competency of evidence—fell within the statutory scheme, despite its inconsistency with the statutory definition of insanity, the verdict of not guilty by reason of insanity, and the consequence of that verdict of diagnostic commitment of the defendant.

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[34] MCL 768.29a(2); MCL 330.2050(1).

And there was no Michigan Supreme Court decision that accepted diminished capacity as either a form of insanity defense, that term being mentioned only in passing by that court, or as a rule of evidentiary competency permitting expert testimony as to the capability of an accused to form a required specific intent.

That the Michigan Supreme Court had, as the *Carpenter* opinion put it, "never specifically authorized its use [the diminished-capacity defense] in Michigan courts," is consequential. The court in *Carpenter* overruled none of its prior decisions, impliedly overruling only several Michigan Court of Appeals cases as inconsistent with the statutory scheme and text. *Carpenter* was thus *not* a law-changing decision. *Hagan v Caspari*[35] makes the point.

In *Caspari*, the defendant was charged with first-degree robbery for a robbery at a gas station involving use of a weapon, and second-degree robbery for the theft a car keys several days later, along with theft of that victim's vehicle. He pled to all charges, but later on post-conviction relief argued that conviction for both the second-degree robbery for stealing the vehicle keys, and theft of the vehicle, violated double jeopardy. The Missouri Court of Appeals agreed, and vacated the vehicle theft conviction. The Supreme Court of Missouri reinstated the conviction, overruling a Missouri

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[35] *Hagan v Caspari*, 50 F.3d 542 (CA 8, 1995).

Court of Appeals case[36] that Hagan had relied on. On federal habeas review, the district court found this overruling to be an "unforeseeable change" in state law, violating Hagan's right to due process. The Eighth Circuit disagreed.

Not only did the Eighth Circuit find that the overruling of the intermediate state court decision was "eminently foreseeable," in that "anyone reading the pertinent Missouri statutes could easily have concluded that [the intermediate decision] was contrary to their plain meaning,"[37] it expressed "some doubt whether a state supreme court's overruling of an intermediate appellate court decision ever can constitute a change in state law for due process purposes." Indeed, the court remarked that "we are strongly inclined to agree with the state that until the state's highest court has spoken on a particular point, the law of the state necessarily must be regarded as unsettled."[38]

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[36] *State v Lewis*, 633 S.W.2d 110 (Mo.App. 1982).

[37] 50 F.3d at 547. The court also eschewed the course taken by the majority opinion here; "[t]he reliance of prosecutors, et al., and the citation of authorities does not make the overruling of *Lewis* more or less foreseeable. To resolve the foreseeability issue, we must examine *Lewis* and its legal underpinnings." 50 F.3d at 545.

[38] 50 F.3d at 547. The court did not so hold, however, because of its conclusion that, given the statutory text, that the intermediate appellate court opinion was mistaken and contrary to the plain meeting of the statute was readily ascertainable.

The Eighth Circuit took this same view more firmly in *Niederstadt v Nixon*.[39] There the Missouri Supreme Court construed the state sodomy statute's requirement of "forcible compulsion" to include "the force inherent in a sex offense committed on a sleeping victim, who cannot resist."[40] The Missouri Supreme Court had never before construed the statute, and distinguished an intermediate court decision. The Eighth Circuit held that

> In this case, the Supreme Court of Missouri did not overrule prior law Indeed, as the Supreme Court of Missouri had not previously considered the statute, there was no prior law to overrule. As we said in *Hagan v Caspari* . 'until the state's highest court has spoken on a particular point of state law, the law of the state necessarily must be regarded as unsettled.' A ruling on an unsettled issue of state law will rarely if ever be unexpected and indefensible.[41]

Also to the same effect is *Armstrong v. State*:[42]

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[39] *Niederstadt v Nixon*, 505 F.3d 832 (2007).

[40] 505 F.3d at 836.

[41] 505 F.3d at 837.

[42] *Armstrong v. State*, 848 N.E.2d 1088, 1094 (Ind.,2006).

> 'That courts have rendered decisions later deemed erroneous by higher authority does not entitle criminal defendants to the benefits of those mistakes. *Bouie* applies only to unpredictable shifts in the law, not to the resolution of uncertainty that marks any evolving legal system." . ; *see also Hagan v. Caspari*, 50 F.3d 542, 547 (8th Cir.1995) (questioning whether "a state supreme court's overruling of an intermediate appellate court decision ever can constitute a change in state law for due process purposes.").[43]

The dissent of Judge Easterbrook in *Cole v Young*[44] is also most instructive, Judge Easterbrook expressing the view that

> The Supreme Court of the United States has never suggested that the construction of a criminal statute by an *intermediate* state court requires the state to apply that decision to all crimes committed before the date of its reversal or overruling. If there were such an entitlement, every conflict among the circuits on the construction of a federal statute would vest in defendants throughout the country the right to receive the most favorable construction

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[43] And see to similar effect *State v Myers*, 150 N.M. 1, 19-20, 256 P.3d 13 (N.M., 2011).

[44] *Cole v Young*, 817 F.2d 412, 434 (CA 7, 1987)(emphasis supplied) (Easterbrook, J., dissenting).

> adopted by any circuit. The Supreme Court of the United States, however, regularly resolves conflicting interpretations of federal criminal law, in the process affirming (or reinstating) convictions that could not have been obtained under the law of one or more courts of appeals at the time the acts were committed. *Bouie* holds not that decisions of intermediate courts may not be altered retrospectively, but that the state's law must give fair notice of what is prohibited. *The statute gives this notice* .

This point is certainly applicable in Michigan. While Michigan has had a "first-rule" since November of 1990, the first opinion out by a Michigan Court of Appeals panel governing later cases in that court, it had no such rule before 1990, and even now a later panel may express its disagreement with an existing Michigan Court of Appeals opinion, triggering a conflict-resolution" panel that may set aside the earlier precedent.[45]

Because, then, there is no "law-changing" decision here, the premise of the Sixth Circuit majority opinion is mistaken, and no violation of due process could have occurred.

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[45] MCR 7.215(J).

B. If the *Carpenter* Decision Constitutes A Change in Law, Respondent Was Not Denied Fair Notice, the Change Going Only to the Competency of Evidence On the Element of Specific Intent

(1) The ex post facto clause has no application to judicial proceedings

The ex post facto clauses of the United States Constitution are not a restraint on the judiciary. The text makes the point plain. Article I, § 10 restricts state legislatures from passing ex post facto laws: "No State shall pass any ex post facto Law. " That the restriction is on the legislature is express in the text, and this Court has repeatedly so held.[46]

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[46] See e.g *Calder v Bull*, 3 U.S. 386, 1 L.Ed. 648 (1798); *Ross v Oregon*, 227 U.S. 150, 33 S.Ct. 220, 57 L.Ed. 458 (1913); *Frank v Mangun*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); *Marks v United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed. 2d 260 (1977); *Dobbert v Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); *Collins v Youngblood*, 497 U.S. 37, 110 S.Ct.2715, 111 L.Ed2d 30 (1990).

(2) Neither the due process clause, in the case of legislation, nor the due process clause, in the case of judicial decisions, preclude retrospective application of evidentiary principles that do not diminish the quantum of proof required to convict

Where the retrospective application of a statute is at issue, the constraints on the legislature imposed by the ex post facto clause are four-fold:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.[47]

In the *Carmell* case, this Court considered the fourth category of ex post facto laws, as Texas had statutorily changed its rule that evidence of certain

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[47] *Carmell v. Texas*, 529 U.S. 513, 522, 120 S.Ct. 1620, 1627, 146 L.Ed.2d 577 (2000) (quoting *Calder v Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798).

sexual offenses was insufficient to convict without corroboration of the victim's testimony to a rule that the victim's testimony alone was sufficient. This was not, this Court said, simply application of an altered rule of evidence, but a rule of sufficiency of evidence, as, before the statutory change, if no corroborating proof was offered the accused could not be convicted. The ex post facto clause, said the Court, precludes retrospective application of a statute reducing the quantum of evidence *required* to convict to conduct occurring before that change. But the Court was careful to distinguish these sufficiency rules from ordinary rules of evidence or witness competency, saying that

> We do not mean to say that every rule that has an effect on whether the defendant can be convicted implicates the *Ex Post Facto* Clause. Ordinary rules of evidence, for example, do not violate the Clause. to the extent one may consider changes to such laws as "unfair" or "unjust," they do not implicate the same *kind* of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard. Moreover, while the principle of unfairness helps explain and shape the Clause's scope, it is not a doctrine unto itself, invalidating laws under the *Ex Post Facto* Clause by its own force.[48]

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[48] 529 U.S. at 533, 120 S.Ct. at 1633.

If, then, a statutory change in a rule or principle of evidence does not reduce the quantum of evidence required to convict, the change may be applied retroactively; this has often been done, and upheld.[49] And such a change cannot possibly work a denial of fair notice to an accused of that conduct which constitutes the offense.

(3) The due process clause does not require application of the ex post facto clauses to judicial acts, requiring instead that a criminal statute give fair warning of the conduct that it makes a crime, and respondent received fair notice

While it is true that a portion of the protections afforded by the ex post facto clauses coincides substantially with the protection of fair notice

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[49] See e.g. *Schroeder v Tilton*, 493 F.3d 1083 (CA 9, 2007)(statutory change allowing evidence of defendant's prior sex crimes); *Gentry v. Sinclair*, 2013 WL 174441, 19 (CA 9, 2013)("admitting victim impact statements did not change the elements of Gentry's crime"); *Doe v. Busby*, 661 F.3d 1001, 1023 (CA 9, 2011); *Palmer v. Clarke*, 408 F.3d 423, 431 -432 (C A 8, 2005); *State v Rose*, 42 A.3d 172 (N.J.Super.Ct., 2012) (retroactive application of forfeiture by wrongdoing rule); *Carpenter v Commonwealth*, 654 S.E.2d 345 (Va.App, 2007)(retroactive application of amended marital-communications privilege); *United States v Alexander*, 805 F.2d 1458 (CA 11, 1986) (retroactive application of federal rule of evidence forbidding expert witness from statement of opinion as to legal insanity of the accused).

provided by the due process clause, there is no actual "analogy" to be applied. Rather, accepted fair-notice principles are simply applied to law-changing decisions of state supreme courts. To say that the due process clause "enacts" or promulgates an ex post facto clause applicable to the judiciary identical in scope to the specific constitutional limitation on legislative power stretches the point; it cannot be said that the due process clause creates a precise image of the ex post facto clause to be applied to judicial decisions, for, as Professor LaFave has put it, "all case-law, including that interpreting criminal statutes, operates retroactively, and such retroactivity is an essential part of our legal system. It is fair to conclude that: (1) the prohibition of retroactive judicial decisions is not as extensive as the prohibition of ex post facto statutes; and (2) the law regarding the former is not as clearly developed as that concerning the ex post facto clause."[50] It is not a correct approach to the question, then, to take ex post facto principles and apply them to judicial decisions which alter previous judicial decisions, or interpret a statute for the first time. The due process restriction is more limited than that.

The lead case, of course, concerning the requirement under due process of fair notice as applied to judicial law-changing decisions is *Bouie v*

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[50] 1 LaFave, *Substantive Criminal Law* (2d ed) § 2.4.

City of Columbia,[51] and its rationale is thus critical to the inquiry here. It is familiar history that the prosecution there arose from a "sit-in" demonstration in a drug store in South Carolina in 1960, where, after the defendants, who were African-Americans, were seated at a booth in the restaurant department of the drug store, an employee put up a chain with a "no trespassing" sign attached, and the manager called the police when the defendants continued to sit quietly in the booth. When the police arrived, the manager asked the defendants to leave, and they did not do so. The police asked also, stating it was a "breach of the police" for the defendants to refuse to leave, and arrested the defendants when they did not leave. They were charged with criminal trespass and convicted.

The defendants argued that "they were denied due process of law either because . . . the statute failed to afford fair warning that the conduct for which they have now been convicted had been made a crime."[52] That fair notice is required by due process had long been understood, this Court stating, for example, in *Connally v. General Const. Co.*[53] that a penal statute which forbids the doing of an act "in terms so vague that men of common

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[51] *Bouie v City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed. 2d 894 (1964).

[52] 387 U.S. at 349, 84 S.Ct. at 1700.

[53] *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Put another way, "criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law."[54]

Bouie was unusual in that the penal statute itself was "admirably narrow and precise."[55] It defined the prohibited conduct as "*entry* upon the lands of another. *after* notice from the owner or tenant prohibiting such entry...." The state supreme court, however, construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of *remaining* on the premises of another after receiving notice to leave, a construction at once contrary to the "narrow and precise" statutory text and inconsistent with prior judicial constructions of the statute, thereby expanding the conduct covered by the terms of the statute in a way which was unforeseeable to a person of ordinary intelligence.

Applying well-established fair-notice doctrine, this Court held that if a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," the decision may not

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[54] *Jordan v. De George* 341 U.S. 223, 230, 71 S.Ct. 703, 707 (U.S. 1951).

[55] 387 U.S. at 351, 84 S.Ct. at 1701.

be applied retroactively. Because the interpretation of the statute given by the South Carolina Supreme Court was "clearly *at variance with the statutory language*," and had "not the slightest support in prior South Carolina decisions"; indeed, those decisions had emphasized that proof of notice *before* entry was required to sustain a conviction, retroactive application of the statute as newly construed thus violated due process.[56]

Though unnecessary to the decision—established fair-notice principles were sufficient for the task—the Court noted that when a statute is "enlarged" by an "unexpected and indefensible"[57] judicial construction its retroactive application "operates precisely *like* an ex post facto law," and the Constitutional expressly forbids an expost facto law, one that "makes an action done before the passing of the law, and which was innocent when done, criminal . . . ."[58] But that application of an unexpected and indefensible construction of a penal statute to conduct occurring before that construction is "precisely like" an ex post facto law does not mean that it is barred by the ex post facto clause, or that, because the ex post facto clause bars such legislation due process for that reason precludes application of these sorts of judicial

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[56] See 12 L Ed 2d at 900-901 (emphasis supplied).

[57] 387 U.S. at 354, 84 S.Ct. at 1703.

[58] 387 U.S. at 353, 84 S.Ct. at 1702 (emphasis supplied), quoting *Calder v Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798).

constructions of statutes. That the Court continued on to say that if "a state legislature is barred by the Ex post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction,"[59] is unfortunate, as it is a non sequitur. It does not necessarily follow that the judiciary may not do that which the constitutional limitations on ex post facto legislation prohibit, for those limitations are *not* limitations on judicial power. And *if the ex post facto clauses did not exist* the result in *Bouie* would *still* be required, for it is the fair notice required by due process that compelled the result there, and in all indistinguishable cases, not an application of the ex post facto clause by analogy through due process.

The other critical case is *Rogers v Tennessee*.[60] Tennessee had long considered it necessary that death occur within a year and a day of the injuries inflicted for criminal homicide to be proven. But the Tennessee Supreme Court abrogated the rule, and applied the murder statute *sans* the year-and-a-day requirement to Rogers. The petitioner took this Court's language in *Bouie* that where "a state legislature is barred by the Ex post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by

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[59] 387 U.S. at 353-354, 84 S.Ct. at 1702.

[60] *Rogers v Tennessee*, 532 U.S. 451, 121 S.Ct 1693, 149 L.Ed.2d 693 (2001).

judicial construction" to mean that *Bouie* had in effect *held* that "'[i]n evaluating whether the retroactive application of a judicial decree violates Due Process, a critical question is whether the Constitution would prohibit the same result attained by the exercise of the state's legislative power.' Brief for Petitioner 12."[61] This Court disagreed. *Bouie*, as amicus has said, is a fair-notice case, and those principles stand—and required reversal of the convictions there—without application of the ex post facto clauses in any fashion.

This Court concluded that the abolition of the year-and-a-day causation rule for homicide by the Tennessee Supreme Court was not "unexpected and indefensible." Important to the court was that the case involved not a judicial construction of an admirably precise and narrow statutory text, as in *Bouie*, that was indefensible in light of that text and prior judicial decisions applying that text, but "but rather the continuing viability of a common law rule." The Tennessee Supreme Court's decision was but a "routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense."[62] Because the alteration of the common-law rule was

---

[61] 532 U.S. at 458, 121 S.Ct. at 1698.

[62] 532 U.S. at 467, 121 S.Ct. at 1703.

not unexpected and indefensible, its application to the petitioner did not deny fair notice.[63]

Because *Rogers* was a close case, and because even under the view of the dissenting justices to that decision the conviction in the present case should be affirmed, review of the principal dissent of four justices is appropriate.[64] The fundamental difference between the dissent and the opinion of the Court was the meaning of fair-notice principles under due process, the dissent arguing that the "'fair warning' to which *Bouie* and subsequent cases referred was not 'fair warning that the law might be changed,' but fair warning *of what constituted the crime at the time of the offense,*" so that *"Bouie* did not express disapproval of 'unexpected and indefensible changes in the law' .[but] disapproval of '*judicial construction* of a criminal statute' that is 'unexpected and indefensible *by reference to the law which had been expressed prior to the conduct in issue.*"[65]

---

[63] 532 U.S. at 464, 121 S.Ct. at 1701. The Court also observed that in its view "the year and a day rule had only the most tenuous foothold as part of the criminal law of the State of Tennessee."

[64] Justice Breyer joined in only part II of Justice Scalia's dissenting opinion, which was joined in full by Justices Thomas and Stevens.

[65] 532 U.S. at 470, 121 S.Ct. at 1704-1705 (emphasis supplied in the dissent)

One does not have to reject the logical force of the *Rogers* dissent[66] to find it readily distinguishable from the present case. Before the Tennessee Supreme Court's decision, one could not be convicted of murder where the victim died more than one year and a day after the assault, and after it one could. In the present case, the elements of the offense have not changed at all; rather, at most, evidence that was competent to counter proof of an element is no longer competent. This is no different that if the rules of evidence were changed to ban character proof of the accused in the form of opinion. In either case, the evidentiary change can be applied to conduct occurring before the change.

---

[66]In Michigan, the year-and-day rule was abolished by case decision, but applied in a "purely prospective manner." *People v Stevenson*, 416 Mich. 383, 331 N.W.2d 143 (1982) (and note that Tennessee has a statute providing with regard to the penal code that "The provisions of this title shall be construed according to the fair import of their terms, including reference to judicial decisions and *common law interpretations*, to promote justice, and effect the objectives of the criminal code" T. C. A. § 39-11-104(emphasis supplied)). While this avoids notice problems under due process, it raises the specter of the opinion being purely advisory. See *James Beam Distilling v Georgia*, 501 US 529, 115 L Ed 2d 481, 111 S Ct 2439 (1991), concurring opinion of Justice Scalia, finding purely prospective opinions to lie outside the judicial power. This counsels courts to follow the wisdom of Michigan's Justice Campbell and leave the alteration of statutes—including those that embrace common-law terms—to the legislature.

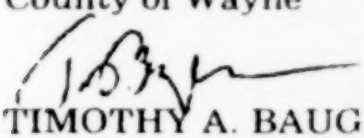
Because, then, the most that can be said is that the Michigan Supreme Court in *Carpenter* made clear that there is no evidentiary rule in Michigan that allows as competent evidence expert testimony on the issue of specific intent when that intent is an element of the offense, that decision in no way lessening the quantum of proof necessary to convict nor in any way changing the elements of the crime, it cannot be said that respondent was denied fair notice of that conduct which constitutes the offense charged.

Conclusion

Wherefore, amicus submits that the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

Kym L. Worthy
Prosecuting Attorney
County of Wayne



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JOINT APPENDIX

RECORD
AND
BRIEFS

No. 12-547

In the Supreme Court of the United States

LINDA METRISH, WARDEN, PETITIONER

v.

BURT LANCASTER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Petition for Writ of Certiorari Filed October 31, 2012
Certiorari Granted January 18, 2013

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

93-127632-FC

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Oakland County
Judge John J.
McDonald
People V Lancaster,
Bur

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v File No. 1993 127632 FC

BURT LANCASTER,
Defendant.
_____/

MOTION

BEFORE THE HONORABLE
JOHN J. MC DONALD, CIRCUIT JUDGE
Pontiac, Michigan – June 23, 2004

APPEARANCES:

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For Defendant: **KENNETH MOGILL**

REPORTED BY: Sheila Cole, RPR, CSR, CER-0194
Certified Shorthand Reporter
(248) 858-1703

Received Jan 17 2006
Second District
Sandra Schultz Mengel
Chief Clerk

[Page 2]

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WITNESSES:
None.

EXHIBITS: Identified Admitted
None.

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Pontiac, Michigan

June 23, 2004

THE CLERK: Calling docket number two case number 93 127632 FC, People versus Lancaster.

MR. MOGILL: Good morning.

THE COURT: Good morning.

MR. WALTON: Good morning.

MR. MOGILL: If it please the Court, Kenneth Mogill appearing on behalf of Mr. Lancaster. Judge --

MR. WALTON: Paul Walton.

MR. MOGILL: I'm sorry.

MR. XXX: Paul Walton on behalf of the People of the State of Michigan.

MR. MOGILL: If it please the Court Mr. Lancaster is charged with first-degree murder in this case. And as the Court knows this is the case where the incident giving rise to the prosecution occurred in 1993. The first trial was in 1994. The defenses were diminished capacity and legal insanity.

Mr. Lancaster has a long and clearly documented history of mental illness, not only himself, but also running deeply through his family.

[Page 4]
He was convicted as charged and at the State Court of Appeals --

THE COURT: (Interposing) I know all of that of the background.

MR. MOGILL: Okay. Basically we are in a situation where as the result of the --

THE COURT: (Interposing) Change in the law --

MR. MOGILL: Change in the law in Carpenter the question is whether I am going to be permitted to raise the diminished capacity defense on the retrial.

I respectfully submit to the Court that Carpenter doesn't affect my right to raise that defense in this case since the original case occurred before Carpenter. And there are several reasons for this.

First, I think it is clear that the changes were as a result of Statute, the ex-post facto clause of the Federal Constitution would prohibit the State from depriving Mr. Lancaster of the right to --

THE COURT: (Interposing) Well, the Statute didn't change though.

[Page 5]
MR. MOGILL: And --

THE COURT: It's the interpretation of the Statute. The Supreme Court said --

MR. MOGILL: Well the Statute didn't --this is not a statutory change. Where I am going is, the Supreme Court has held, the U. S. Supreme Court has held in Louie v Columbia (all phonetic) that where it's a judicial change in the law which we have here the same principles apply fully. And that's the point here.

THE COURT: Okay.

MR. MOGILL: That just as the Legislature couldn't take away a Statutory defense because of the ex-post facto clause, the due process clause prohibits a judicial change in the law from applying retroactively.

Now I know the Prosecution is arguing that in Carpenter the Supreme Court said well, there never was a diminished capacity right. First of all that is clear dictum because it is not in any way essential to their holding.

Second, with all due respect to the Court it is really an Orwellian kind of a statement. Obviously there has been a defense. It has been recognized in published

[Page 6]
decisions. It is a standard jury instruction. It was raised in this trial. And if Mr. Lancaster is not allowed

to raise the defense of diminished capacity in this case he will be punished; the prosecution will be rewarded as the result of structural error that rendered the first trial null and void.

THE COURT: But you are still going to have the insanity defense. Obviously.

MR. MOGILL: But the insanity defense would be a complete defense. Diminished capacity would be a partial defense. Which is another point that's -- that I argue in the brief. And it is also critical here.

Mr. Lancaster has a Constitutional right to present competent evidence that tends to negate any element of the offense charged. Men Rea is an essential element of the Prosecution's proofs. And he's got a due process right of -- a Fifth amendment right to present evidence whether you call it diminished capacity or just the right to present evidence in defense of the charges. And that would be abrogated as well if we can't present this.

The Prosecution is relying on People v

[Page 7]
Talten (phonetic) for their position. And I think this Court has a copy of it. I respectfully submit to the Court that Talten is not good law for a number of reasons.

First of all it is an unpublished decision. It is not XXXX binding. Second, the facts aren't the facts here. Talten involves -- does not involve a case where the offense occurred prior to -- that case involved facts where the trial, -- it was an initial trial prior to

Carpenter. And -- and there was an effort to deprive the defendant raising a defense at a retrial that had been raised the first time around.

Moreover if you look at the opinion in Talten it badly mistakes what constitutes the ex-post-facto Doctrine. And it ignores key cases and deletes key language about deprivation of a defense. It is just -- with all due respect to the Court in that unpublished opinion, it's just bad law.

Ultimately I think the situation boils down to this; and I think it is a difficult situation for the Court. Even though the language that diminished capacity was never a defense is dictum I suspect that if the Michigan Supreme Court

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were to consider this they could well say, no you can't raise it. And having seen and being familiar with the Court's opinions in things like that, I think in all candor I can make that statement. Having said that though, it's also clear that they are not the last word here. And the last thing that we need is to have a second trial that is null and void. And all the time and energy and resources that went into the first trial be wasted a second time.

With all due respect to the Michigan Supreme Court if Mr. Lancaster is deprived of the opportunity to submit evidence in support of his diminished capacity defense in this case, we are going to be right back where we were with an even stronger habeas issue than I had the first time. And it would be a total waste. Judge the Michigan Supreme Court just cannot by its

decision in Carpenter; deprive Mr. Lancaster of the right to present this defense.

I think I have set everything out in more detail in the briefs. And I will answer any questions the Court has.

THE COURT: No. Let me hear from Mr.

[Page 9]
Walton.

MR. WALTON: Your Honor, Talten does speak directly on this issue. In Carpenter the Michigan Supreme Court made it very, very clear that the issue of diminished capacity was not a defense. It was a judicially created defense created at the Appellate Court level, not --

THE COURT: (Interposing) It was never before the Supreme Court. The only time the Supreme Court looked at it was in Carpenter, and they said there is no such thing.

MR. WALTON: That is exactly right. And the issue of ex-post-facto is not violated in this case because the highest court of the land, the Michigan Supreme Court, did not speak on that issue at that time. Carpenter is the first case which they did speak on the issue of diminished capacity and they said it was not a defense.

Now, if the Michigan Supreme Court had stated that diminished capacity was a defense and then in a subsequent case Carpenter II. for example were to state that no, diminished capacity is not.

THE COURT: (Interposing) Then you say it would be --

[Page 10]
MR. WALTON: Then it --

THE COURT: -- then it would be a limited application as to whether that is retroactive or not.

MR. WALTON: That's right. Then there would be an ex-post-facto violation. None of the cases cited by counsel address the issue when the highest Court of the land has addressed the issue. That is the only case in which an ex-post-facto intermingled with other six men and due process rights are viable.

I would submit to the Court and argue with counsel that it is not an issue that will be granted habeas. The Michigan Supreme Court and the Michigan Legislature both have ultimate authority as to allow in a State Statutory scheme, to allow certain defenses and to preclude others. This is not a violation of his right to present a defense. As the Court has already indicated the defendant does have the opportunity to present an insanity defense if he so chooses.

The Michigan Supreme Court has made it clear, and the Legislature has also, I thought made it very clear in the Statute, that anything less

[Page 11]
than an absolute abrogation of the intent was not going to be a defense, on a specific intent crime.

So we would respectfully ask that you deny the defendant's motion at this time.

THE COURT: Well, I read your briefs, and I am paraphrasing from Carpenter. But Carpenter pretty much says that the diminished capacity defense never existed, and it was a misinterpretation if you will of the Statute as it existed. And so for that reason I am going to deny your motion.

MR. MOGILL: Thank you Judge.

MR. WALTON: Thank you your Honor.

(Whereupon this matter was concluded on

this date)

* * *

[Page 12]
STATE OF MICHIGAN)
)ss
COUNTY OF OAKLAND)

I certify that this transcript, consisting of * pages, is a complete, true and correct transcript of the proceedings and testimony taken in this case on June 23, 2004.

Date: 8/11/04

Sheila Cole, RPR, CSR, CER
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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

93-127632-FC

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Oakland County
Judge John J.
McDonald
People V Lancaster,
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THE PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff,

-vs-

BURT LANCASTER,
Defendant.
_____/

JURY TRIAL
BEFORE THE HONORABLE JOHN J.
MCDONALD, CIRCUIT JUDGE
Pontiac, Michigan – Monday, May 23, 2005

APPEARANCES:
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For the Defendant: KENNETH M. MOGILL (P17865)
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Received Jan 17 2006
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Sandra Schultz Mengel
Chief Clerk

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EXHIBITS:	RECEIVED:
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* * *

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{End of Opening Statement by Mr. Mogill}
there is a reasonable doubt as to Mr. Lancaster's capacity to form a specific intent to kill and that the correct verdict will be second degree murder.

THE COURT: Okay. Thank you.

MR. WALTON: With the Court's permission. we will call our first witness.

THE COURT: All right.

MR. WALTON: Thank you, your Honor.

(Brief pause.)

MR. WALTON: Please turn and face the clerk.

THE CLERK: Raise your right hand.

In the pending matter before this Court, do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

MS. GARNER: I do.

THE CLERK: Have a seat and watch your step.

MR. WALTON: With the Court's permission.

THE COURT: Go ahead.

JULIE GARNER

was called as a witness by the People, sworn by the Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. WALTON:

Q Ma'am, could you please state your name for the record and spell your last name?

[Page 22]
A Julie Marie Garner, G-A-R-N-E-R.

Q Is it Miss or Mrs. Gardner?

A Miss.

Q Miss Garner, if I can, I would like to draw your attention back to the beginning of April 22nd of 1993. At that time did you know an individual by the name of Toni King?

A Yes.

Q How did you know Ms. King?

A We worked together.

Q Were you friends --

A Yes.

Q -- outside work?

Did you speak to Ms. Garner about personal things in her life?

THE COURT: Do you, do you mean to Ms. King about personal things in her life?

MR. WALTON: I mean -- I'm sorry.

BY MR. WALTON:

Q Did you speak to Ms. King about personal things in her life?

A Yes.

Q You said you had worked together for a time?

A Uh-huh.

Q That's a yes?

[Page 23]
A Yes.

Q Where is it that you worked?

A On Eight Mile and Greenfield, for a Dr. Stephens.

Q Stephens?

A Uh-huh.

Q And he is a, what kind of doctor?

A Dentist.

Q Dentist. And how long had the two of you worked together?

A About five years.

Q And what did you do for Dr. Stephens?

A I'm a dental assistant.

Q And Ms. King?

A Receptionist.

Q Now, back in 1993, did you have a normal time that you took your lunch hour?

A Yes.

Q And what time was that?

A Usually around 12:30.

Q All right. And on April 22, 1993, did the two of you go out to lunch?

A Yes, we did.

Q And do you remember who drove?

A She did.

Q When you say she, you're referring to Ms. King?

[Page 24]
A Right, Ms. King.

Q And do you recall what kind of car Ms. King drove at the time?

A I believe it was a Tempo.

Q A Tempo?

And when you left Dr. Stephens' office, do you recall where you went?

A We went, we proceeded down Greenfield to a bank.

Q Do you remember the name of the bank?

A No.

Q And do you remember where the bank is located?

A On Greenfield and Nine.

Q Did you pull into the bank parking lot?

A Yes.

Q Was the car parked?

A Yes.

Q Did you get out of the vehicle?

A Yes.

Q Prior to your arriving at the bank, did you notice any vehicles that you were familiar with?

A Yes.

Q What did you notice?

A I noticed Mr. Lancaster's car coming up behind us.

Q Okay. You've indicated Mr. Lancaster. Do you know Mr. Lancaster?

[Page 25]
A Yes.

Q How do you know Mr. Lancaster?

A He was a boyfriend of Toni King's.

Q Do you see Mr. Lancaster in court here today?

A Yes.

Q Can you please indicate where he is seated?

MR. MOGILL: Stipulate to ID.

MR. WALTON: Okay.

BY MR. WALTON:

Q You indicated that you had seen a vehicle that you were familiar with?

A Yes.

Q Now, what type of vehicle was that?

A A Stealth.

Q Do you remember the color?

A Black.

Q And when did you first notice this black Stealth?

A Just proceeding down Greenfield, I looked in the side mirror and saw him coming up.

Q Okay. Was that by Dr. Stephens' office or was this closer to the bank?

A In between.

Q Okay. How far is it from Dr. Stephens' office to the bank, approximately?

A Seven minutes. Not long.

[Page 26]

THE COURT: I'm sorry, what was that?

THE WITNESS: Seven minutes.

THE COURT: Seven minutes?

THE WITNESS: Uh-huh.

BY MR. WALTON:

Q I'm going to show you what's marked as People's proposed Exhibit Number 1 up here. Is that the vehicle that you were referencing?

A Yes.

Q Is that Mr. Lancaster's vehicle?

A The vehicle that he was in, yeah.

Q Okay.

MR. WALTON: Move for its admission.

THE COURT: There's no objection, is there?

MR. MOGILL: No. I thought we already --

MR. WALTON: All right. I wasn't sure how the Court wanted to proceed. If there was an objection on it, then I'll --

THE COURT: Okay. Well, that's admitted.

Just for the record, what is this again? What kind of car is this?

MR. WALTON: This is actually a Mitsubishi, your Honor. I can develop that through --

THE COURT: Oh. okay. I thought you already -- I'm sorry. Go ahead.

[Page 27]
BY MR. WALTON:

Q You indicated that you saw the vehicle out of the side of your mirror; correct?

A Yes.

Q Okay. And you indicated that you went into the bank parking lot; correct?

A Yes.

Q And Ms. King had parked the vehicle; correct?

A Yes.

Q All right. Did you see where the Stealth, the black car?

A It was in the parking lot.

Q Okay. Did it follow you into the parking lot?

A Yes.

Q All right. Do you recall where the car is parked, the black car?

A Behind us. Like across from our space.

Q Okay. Did Mr. Lancaster -- was Mr. Lancaster in the car?

A Yes.

Q Was there anyone else in the car?

A No.

Q Okay. And did Mr. Lancaster get out of the car or did you go to the car?

A He got out, yes.

[Page 28]
Q Okay. What happened when Mr. Lancaster got out of the car?

A We went over to the car.

Q I'm sorry?

A We both went over to the car.

Q Okay. And he was standing outside of the car at the time?

A Yes.

Q Okay. Can you describe how he appeared emotionally at the time?

A He, he appeared to be pretty calm. They were discussing something.

Q Okay. When you say they were discussing something, who were you referring to?

A Ms. King.

Q Okay. When you say he was pretty calm, what do you mean by that?

A He didn't seem to be angry at the time.

Q Did he appear to be crying?

A Not that I noticed.

Q Okay. All right. And how far away from the defendant were you at the time?

A A few feet, not --

Q Okay.

MR. MOGILL: I'm sorry, could you repeat that?

[Page 29]
THE WITNESS: A few feet.

MR. MOGILL: Thank you.

BY MR. WALTON:

Q You said that you and Ms. King actually went over and talked to him; correct?

A Yes.

Q Okay. What's the next thing you recall happening?

A I went into the bank to cash a check.

Q Okay. And did you cash the check?

A Yes.

Q Did Ms. King remain outside or did she go anywhere else?

A She remained and then she came into the bank.

Q Okay. So she came into the bank afterwards?

A Yes.

Q All right. And did you talk to her about anything that was going on inside the bank?

A Yes.

Q Okay. What do you recall discussing with her at the time?

A We--

MR. MOGILL: Objection, calls for --

THE COURT: Sustained.

BY MR. WALTON:

Q All right. Did you talk with Ms. King?

A Yes.

[Page 30]
Q All right. What happened after you talked to Ms. King?

A We left the bank.

Q All right. You left the bank and went where?

A To the coney island.

Q When you walked out of the bank, is Ms. King still with you?

A Yes.

Q Was the defendant anywhere in the area?

A Yes, he was still in his space.

Q He was still in the space?

A The parking space.

Q The parking space? Okay. Was he outside or inside of the car at this point, do you recall?

A I don't recall.

Q Okay. Did you talk to him at that point?

A Did I talk to him?

Q Yes.

A No.

Q Did he say anything that you were able to hear?

A Something about lunch.

Q Okay.

MR. MOGILL: I'm sorry, Miss, I'm having trouble. Something?

THE WITNESS: Something about lunch.

MR. MOGILL: Thank you.

[Page 31]
BY MR. WALTON:

Q After that comment was made, what's the next thing that you recall happening?

A We drove to the coney island with him proceeding behind us.

Q Okay. All right. Prior to going to the coney island, did you ever remember a discussion between Ms. King and the defendant? Do you ever remember the defendant referencing or talking about a phone bill?

A Yes

Q Okay. When do you remember that happening?

A On the way to the coney island.

Q Okay. Is this before you left the bank parking lot?

MR. MOGILL: I'm sorry, I think that the question was asked in a way that would call for hearsay, this is -- if they're not in the same car, I think the answer is

referencing hearsay. I would like to get a clarification on that and possibly --

THE COURT: All right. Lay a foundation.

MR. MOGILL: No, the question was not improper, your Honor.

BY MR. WALTON:

Q Who did you hear talking about the phone bill?

A Ms. King.

Q Oh, okay. Thank you. All right.

[Page 32]
Did you hear the defendant reference anything about a phone bill?

A Not that I recall.

Q Okay. All right. You said you drove to the bank parking lot; correct?

A Mm-hmm.

Q That's a yes?

A Yes.

Q I mean, from the bank parking lot to the coney island?

A Yes.

Q Was Ms. King still the driver?

A Yes.

Q Okay. What happens when you get to the coney island parking lot?

A Parked and proceed to get out.

Q Okay.

A And then we noticed that he's pulling up.

Q Okay.

A The --

Q How far -- I'm sorry. How far is it from the bank parking lot to the coney island?

A Again, not five minutes, six minutes.

Q Okay. All right. So you have to get back on Nine Mile and Greenfield?

A Yes.

[Page 33]
Q To get -- okay. Which road, if you recall?

A Back on Greenfield.

Q Okay. All right. You had indicated that Ms. King parked the car?

A Yes.

Q Okay. And both of you got out of the vehicle?

A Yes.

Q Okay. You indicated, then, is that when you noticed the defendant pulling into the parking lot?

A After we had parked.

Q Okay. All right. Both of you are out of the vehicle at this point and you're going to a restaurant?

A Yes, to the coney island.

Q Coney island, okay. What do you recall happening next?

A He pulled up behind us, we were already parked. We was getting out and we were walking toward the coney island and he asked to speak with her.

Q Okay. Now, when he asked to speak with her, what was his mood or his demeanor at that point?

A He seemed the same as he was at the bank, calm.

Q Okay. All right. And when he asked to speak with Toni, what did you do?

A I kind of walked up and then asked her for her keys and her purse.

Q Why would you ask her for her keys and her purse?

[Page 34]
A Figuring that they were going to probably eat lunch and I was going to stay outside and let them have privacy.

Q Okay. All right. Did you get the keys and purse from Ms. King?

A Yes.

Q Okay. What's the next thing that you recall doing after you got the keys and purse from her?

A Telling her to go over and talk to him, but come right back.

Q Okay. And what did you do next?

A I walked toward the coney island.

Q All right. What's the next thing that you recall happening?

A I recall walking up a few steps and then hearing what sounded like firecrackers and turning as I was hearing them, and noticing her falling and noticing the gun sticking out of the window.

Q You indicated that you have heard firecrackers; correct?

A What sounded like firecrackers.

Q Okay. Do you remember testifying on a previous case -- previous time before?

A Yes.

Q Okay. And at that time the question was asked of you, do you remember whether you ever looked back or was your attention drawn back to –

[Page 35]
A Do I recall that question?

Q Yes, ma'am.

A No.

MR. WALTON: If I may have one moment, your Honor.

THE COURT: You may.

(Brief pause.)

MR. WALTON: May I approach the witness, your Honor?

THE COURT: You may.

MR. WALTON: Page 85, counsel, lines 16 through 25.

BY MR. WALTON:

Q Ma'am, I'm going to ask you to read lines 16 through 25.

MR. MOGILL: Before the -- if I can interrupt. It's unclear to me whether the prosecutor is trying to impeach his witness or refresh her recollection. If it's to refresh her recollection, there's not an adequate foundation. So I'm not quite sure what's, what's the situation.

THE COURT: Well, what if, what if it's to impeach?

MR. MOGILL: I doubt he's trying to impeach his witness.

THE COURT: I don't know. What are you trying to do, refresh?

[Page 36]
MR. WALTON: Well, first I'm going to ask her if she remembers the question, after it's been shown to her. She's indicated she doesn't.

THE COURT: Well, what is the question that she doesn't remember?

MR. WALTON: Why they -- why she basically turned around and went back towards Mr. Lancaster.

THE COURT: Did you ask her that question?

MR. WALTON: Yes, your Honor, I did.

THE COURT: And she said she couldn't remember.

MR. WALTON: Yes.

THE COURT: Okay. Then --

MR. MOGILL: Okay. In that case I have no objection.

THE COURT: All right.

BY MR. WALTON:

Q Have you had the opportunity to review that, ma'am?

A Yes.

Q And you testified previously at a trial; correct?

A Mm-hmm.

Q That's a yes?

A Yes. Sorry.

Q And when you testified previously at the trial, was your memory better as to the events than it is today?

A Of course.

[Page 37]
Q And can you indicate what you testified to last time at the trial as far as why you looked back?

A I heard something that sounded like firecrackers.

Q Does it indicate further in the transcript that you had previously testified that you had indicated the victim said something like "Burt?"

A Yes. Or "what."

Q Or what?

A Mm-hmm.

Q Okay. Is that what you were referring to?

A Yes.

Q Did you hear the victim in this case callout the defendant's name?

A I heard "what" or "Burt."

Q Okay. Thank you. So your attention is drawn back to where you just walked; correct?

A Yes.

Q You have to turn around, turn around to see what's going on?

A Yes.

Q Okay. What do you recall seeing at this point, when you turn around and look?

A I recall seeing her falling, I seen a gun sticking out from the car and hearing firecrackers.

Q Okay. All right. You recall her falling; correct?

[Page 38]
A Yes.

Q Okay. Do you recall -- and you said you also recalled seeing a gun sticking out of a car; correct?

A Yes.

Q Is that a yes?

A Yes.

Q Okay. Which car do you recall the gun sticking out of?

A The black car.

Q Okay. Is this Mr. Lancaster's car that you have previously identified?

A Yes.

Q Okay. Did you see anyone else in the car with Mr. Lancaster?

A No.

Q Okay. When Ms. King had approached, was walking with you into the coney island before, you said you had noticed that Mr. Lancaster -- in the parking lot; correct?

A Yes. He pulled up right behind us.

Q Okay. Did he ever get out of his car while in the parking lot?

A No.

Q Okay. So he remained in the car?

A Yes.

Q When he called to Ms. King for him -- for her to come

[Page 39]
over to him, were his windows up or down?

A Down.

Q All right. And you indicated that you had walked past, past them after you recovered the -- after you got her purse and keys?

A Right.

Q And you turned back when you heard the noise?

A Right.

Q And you saw a hand sticking out the window; correct?

A Yes.

Q What window did you see the hand sticking out?

A The driver's side.

Q Can you describe what you saw in the hand?

A It wasn't a hand, it was more like the end of, of -- end of a gun.

Q Okay. All right. And you said you also heard -- you saw Ms. King falling. After you saw Ms. King falling, did you hear any additional shots? If you recall.

A I don't recall.

Q Okay. How many firecracker sounds do you recall hearing?

A Two to three.

Q Okay. What -- when you saw Ms. King falling to the ground and these sounds, coupled with these sounds, what did you do in response?

[Page 40]
A I started towards her and then I realized that she was shot.

Q Okay.

A And so I decided to go the other way and get help.

Q All right. And where did you run for help?

A Inside the coney island.

Q And when you went to the coney island, did you – how did you ask for help?

A I went to the door and asked someone to call for help.

Q Okay. After you made this request, what did you do?

A I went back to Toni.

Q And this is in the parking lot?

A Yes.

Q What was Ms. King's condition at the time?

A She was on the pavement, she was shot, she was bleeding, she was dying.

Q All right. The black car that you had identified as the defendant's car, was that still in the parking lot?

A No.

Q Did you get a sense or did you see what direction it went?

A No, I did not.

Q Now, after you made this phone call and you saw your friend, did the police arrive at the scene?

A Yes. Many police.

[Page 41]
Q Okay. When the police arrived at the scene, did you speak with any of the officers?

A Yes.

Q When you spoke with the officers, did you indicate who shot your friend?

A Yes.

MR. MOGILL: Objection. What she said then is hearsay in terms of now.

MR. WALTON: She's in court, able to testify.

THE COURT: I know; but hearsay is any out-of-court statement that's not subject to cross-examination at the time it was made. So even though, even though she is here in court, the statement she made outside the court is a hearsay statement.

MR. WALTON: Okay.

BY MR. WALTON:

Q Were you upset?

A Yes.

Q Were you emotional?

A Very.

Q What did you tell the police?

A That she was shot by Burt Lancaster.

MR. MOGILL: Excuse me.

THE COURT: Okay. Now, that could -- that can come under the excited utterance exception.

[Page 42]
MR. MOGILL: Okay. And since it's not --

THE COURT: It's hearsay, but this -- now it's an exception to the hearsay rule.

MR. MOGILL: Yes. Thank you. Judge.

THE COURT: Okay. All right.

BY MR. WALTON:

Q All right. Now, when you had spoken to the defendant prior to this occasion on the telephone --

A Yes.

Q -- had the defendant ever called you at work?

A Not me personally. But he called work.

Q Okay. He called work. Did you ever speak with him while he called work?

A Yes.

Q And approximately -- did he ever make any statements concerning the health or safety of Ms. King?

A Yes.

Q Approximately how soon before this shooting did he make statements about Ms. King?

A That I don't recall. Maybe a month.

Q I'm sorry?

A That I don't recall. Approximately, maybe a month.

Q About a month?

A Maybe a month.

Q Okay. If I can, I want to focus your attention a little

[Page 43]
bit on this conversation.

A Mm-hmm.

Q Is that okay?

A That's fine.

Q All right. When the defendant called, who did he call?

A He called Toni.

Q Okay. How did you pick up the phone or how were you able to hear the defendant?

A She was busy and she couldn't pick it up. She was in the front. I was in the back. I picked up the receiver.

Q Okay. And you recognized Mr. Lancaster's voice?

A Definitely.

Q Okay. And when you spoke to him, what did he say to you at the time?

A He said that he wanted to speak with her and I said she was busy.

Q How did he respond?

A He was angry. Loud.

Q What's the next thing that you recall him -- how the conversation proceeded next?

A I recall him saying that he was going to kill her.

Q When you heard that, what did you say to him?

A I don't recall what I said to him.

Q Did you tell Ms. King what was told to you?

A Definitely.

[Page 44]
Q And you said this conversation was about a month before, to the best of your recollection .

A The best of my recollection, right.

Q Did he indicate to you why he wanted to kill her?

A I don't recall his exact words.

MR. WALTON: Court's indulgence.

(Brief pause.)

BY MR. WALTON:

Q When you saw Ms. King in the parking lot, when your attention was drawn back to the vehicle, you said she was standing outside the vehicle; correct?

A Yes.

Q And you saw a hand extended outside the vehicle; correct?

A I saw a gun extending outside.

Q Okay. I'm sorry. How far was Ms. King from the gun?

A Close.

Q When you say close, what do you remember?

A Close.

Q Feet, yards?

MR. WALTON: If I can, if I may approach, your Honor?

BY MR. WALTON:

Q I'm going to back up and I'm going to ask you to tell me to stop, the distance that you recall Ms. King being

[Page 45]
from the vehicle. Okay?

A Right there.

Q About four feet, then?

A Mm-hmm.

Q That's a yes?

A Yes.

Q Okay. If I can, are you familiar with the parking lot?

A Very.

Q I'm going to refer your attention to People's proposed Exhibit Number 2 in this case. Is this a fair and accurate diagram of the parking lot area?

A Yes.

Q Okay. Just for the record, across the top is Nine Mile Road. Do you see that?

A Mm-hmm.

Q That's a yes?

A Yes.

Q And down the side is Foster Winter. Do you see that?

A Yes.

Q Okay. Where the vehicle is located on this diagram, on People's Exhibit Number 1, is that a fair approximation as to where you recall Ms. King parking the car?

A Yes.

Q And this is the coney island that you were referencing?

A Yes.

[Page 46]
Q Okay. So you and Ms. King got out of the vehicle and began walking down towards the coney island, towards the bottom of this diagram; correct?

A Yes.

Q Do you see where the S is?

A Uh-huh.

Q That a fair approximation of where you recall seeing the black car? The --

A Pretty fair.

Q -- defendant's vehicle?

A Pretty fair.

Q Okay. So you and Ms. King walked down towards this vehicle; correct?

MR. MOGILL: Excuse me. This is all asked and answered and he's also leading now.

MR. WALTON: I'm referring to --

THE COURT: Well, they would be leading, but go ahead.

MR. WALTON: All right. Thank you.

THE COURT: You're just trying to get the locations, approximately; right?

MR. WALTON: Yes, your Honor.

THE COURT: Okay. Go ahead.

BY MR. WALTON:

Q So Ms. King remained in this area and you continued down

[Page 47]
towards the coney island; correct?

A Mm-hmm.

Q Okay. And when you returned back outside the coney island, is this the approximate location Ms. King was?

A Yes.

Q Okay. Thank you.

MR. WALTON: I have no further questions, your Honor.

THE COURT: Cross-examination.

MR. MOGILL: Thank you.

CROSS-EXAMINATION

BY MR. MOGILL:

Q Miss Garner, my name is Ken Mogill and I'm Burt Lancaster's lawyer.

MR. MOGILL: Mr. Walton, would you turn that off for a second?

MR. WALTON: Do you want it off? I'm sorry.

MR. MOGILL: I would like it off, please.

MR. WALTON: Sure.

BY MR. MOGILL:

Q Are you familiar with the contents of this?

A No.

Q I'll give you an opportunity.

A Oh, for Dr. Owens(sic)?

THE COURT: I'm sorry, I couldn't hear her.

[Page 48]
MR. WALTON: Let me turn it down.

THE COURT: And the reason why I say this, because where you're standing and she's talking to you, the voice is going over there and I can't hear her. Do you mind standing over here? I can hear her better if you do.

MR. MOGILL: No problem.

THE COURT: Or else, I guess I could sit in the jury box.

MR. MOGILL: In this case, you can --

THE COURT: I guess I could, couldn't I? Well, go ahead. If I can't hear I'll let you know.

BY MR. MOGILL:

Q Okay. Dr. Owens is what kind of doctor?

A Oral surgeon.

Q Okay. And how long have you worked for Dr. Owens?

A Six years.

Q You've had a chance to take a look at the diagram that's up on the board there before coming back into court today; isn't that right?

A Yes.

Q Okay. And you didn't prepare the diagram; isn't that correct?

A No.

Q It was done by a police officer?

[Page 49]
A I assume.

Q Okay. And to the best you can remember, it's a pretty accurate drawing of those terrible events of April 22, 1993, isn't it?

A Yes, it is.

MR. MOGILL: Now, how do I turn this off?

MR. WALTON: Do you want to -- are you going to refer back to it?

MR. MOGILL: No. I'm done with it.

MR. WALTON: Okay. Just hit power twice.

MR. MOGILL: Thank you.

BY MR. MOGILL:

Q In April of '93, how long had you been friends with Toni King?

A About five or six years.

Q Pretty much the whole time you were working for Dr. Stephens; is that right?

A Yes.

Q And how long had you personally known Mr. Lancaster?

A Two or three months.

Q How many times had you seen him?

A Four or five times.

Q Usually at a lunch situation like this?

A Always at lunch.

Q Okay. And how many times did you talk with him, other

[Page 50]
than times when you saw him at lunch?

A Probably twice.

Q Okay. It's fair to say, is it not, that you wouldn't have wanted to see Toni, or anybody else, for that matter, get hurt; right?

A Right.

Q And that if somebody made a threat to Toni or anybody else that you thought was real, you would have contacted the police, wouldn't you?

A Yes.

Q Now, you testified a little bit ago that there was a time -- and no one is expecting you to know exactly when -- you said it was about a month before April 22nd, when you claim that Burt threatened her?

A Maybe, mm-hmm.

Q Okay. Approximately, threatened Toni. Is that what you were saying?

A Yes.

Q Okay. At the time you didn't think that threat was anything that would lead you to call the police, did you?

A Yes, I did.

Q But you didn't call the police, did you?

A I went to the station.

Q You did? Did you file a report?

[Page 51]
A I talked to someone at the Southfield Police Station. They threw me out.

THE COURT: I'm sorry, what did you say? You talked to someone, and then you trailed off.

THE WITNESS: At the Southfield Police Station.

THE COURT: You talked to someone at the station.

THE WITNESS: Then they threw me out.

BY MR. MOGILL:

Q He threw you out?

A Yes.

Q As far as he was concerned, it didn't sound like anything serious?

A Right.

Q But for whatever reason, there was something about it that led you to think it was important to take action?

A Yes.

Q When in the late -- how soon after this conversation in which Mr. Lancaster made the statement did you go to the police?

A I believe we went that night.

Q Okay. Tell the Court, if you would, please, to the best of your memory, all these many years later, at the time that Burt Lancaster was on the phone with you and made that statement, how did his voice sound to you?

A Angry.

[Page 52]
Q And what else could you tell from your listening to him at that time about his emotional state?

A All I know, he was angry. I don't know anything about his emotional state.

Q Okay. From the times that you had seen or spoken with Mr. Lancaster, even before April 22 of 1993, you had come to the conclusion that he was unstable; isn't that right?

A I don't recall coming to that conclusion.

Q Okay. Do you remember ever using the word unstable to describe Mr. Lancaster?

A Unstable?

Q Right.

A That particular word?

Q Yeah.

A No.

Q Or saying not stable?

A Not that I recall.

Q Okay. I would like to show you something if I, if I could, please. And let me just, with the Court's permission, I better move the water so I don't knock it over.

A Mm-hmm.

Q Ms. Garner, after these terrible events you spoke to the police not only at the stop on the scene there, but also

[Page 53]
one or two other times, didn't you?

A Yes.

Q Okay. And did there come a time in one of these conversations with the police officer where an officer wrote out questions and you wrote answers to them?

A Yes.

Q Okay. What I would like you to look at is several pages here, not to look at the whole thing, but ask you if mid day on April 23, 1993, the day after this terrible incident, you were interviewed by a Southfield police officer and wrote out a number of statements. I believe there's quite a few pages. Does this look about right?

A Mm-hmm.

Q Okay. And in the course of writing those out, did you indicate that your experiences with Mr. Lancaster, that it was your perception that he was not stable?

A Did I? Can you show me that?

Q Okay. I want to show you at the top of this page here and ask you if that is in fact your -- what you wrote?

A Yes.

Q Okay. So would it be correct that at that time you did believe that Mr. Lancaster was an individual who was not stable?

A I guess so.

MR. MOGILL: I have nothing further.

[Page 54]
THE COURT: Anything else, by the way of redirect?

REDIRECT EXAMINATION

BY MR. WALTON:

Q What led you to that conclusion or to that -- the term that you used, not stable?

A I am assuming that I was very emotional at the time.

MR. WALTON: Again. may I approach?

THE COURT: You may.

BY MR. WALTON:

Q I'm going to ask you to read the question before, your response.

THE COURT: Is this to herself?

MR. WALTON: Yes.

BY MR. WALTON:

Q And see if that refreshes your recollection as to why you were indicating that to the police officer on that day.

A Okay. You want me to read which?

Q I'm sorry.

MR. WALTON: May I approach again, your Honor?

THE COURT: You may.

BY MR. WALTON:

Q Okay. Question down here, your response, following to the next page, down here. Okay?

A This first question, "Was he --"

[Page 55]
Q Just to yourself.

A All to myself?

Q Yes. See if that refreshes your recollection as to what you discussed with the police at that time as to why you used the term unstable. Or not stable, excuse me.

A Okay.

Q Does that refresh your recollection as to why you used the term not stable?

A Yes.

Q And why is that?

A Because he would do lots of different things, like call and say forgive me and, you know, change his mind, things like that.

Q Okay. In your initial response do you not indicate to them here, when asked by the officer --

MR. MOGILL: Objection to leading.

THE COURT: Okay. You can't.

MR. WALTON: What's that?

THE COURT: Sustained.

BY MR. WALTON:

Q In your response to the police officer -- all right, we can do it this way.

When you just testified he would do things like that and then call and say he loved you, what did you mean "things like that?"

[Page 56]
A He said -- he would call and say things like "I love you, forgive me."

Q Okay. For what? Forgive him for what?

A For being angry, for having an argument with her on something.

Q Now, do you recall in the previous question discussing with the police, or writing out a response, indicating the types of things that Mr. Lancaster would

do that would cause him to say, call back later and say he was sorry?

A I don't recall everything.

Q Do you recall what you wrote down to the police at this time?

A No.

MR. WALTON: May I approach the witness?

THE COURT: You may.

BY MR. WALTON:

Q I ask you to read the question and your response to yourself.

A (Witness complies.)

Q Does that refresh your memory, ma'am?

MR. WALTON: May I approach the witness, your Honor?

THE COURT: You may.

BY MR. WALTON:

[Page 57]
Q What do you recall indicating to the police the types of things he did that were causing him to call back and say he was sorry?

A Cutting up her tires, breaking windows, things like that.

Q Of her stuff?

A Yes, of her car.

Q And then he would call to apologize about it afterwards?

A Yes.

MR. WALTON: Thank you. I have nothing further.

THE COURT: Anything else, based on the redirect?

RECROSS-EXAMINATION

BY MR. MOGILL:

Q Miss Garner, it's correct, is it not, that the kind of events that Mr. Walton just asked you about that led you to believe that Mr. Lancaster was not stable, those are incidents that, depending on who is doing them and what their mental state is, you might describe a person who is doing that as just bad or as something else, and in your case you chose to describe him as not stable; isn't that right?

A Yes.

Q As opposed to anything else?

A Yes.

MR. MOGILL: Thank you.

[Page 58]

THE COURT: I just have a couple questions, I just want to make sure I understood something.

EXAMINATION

BY THE COURT:

Q In response to one of the questions put to you by Mr. Mogill, Mr. Lancaster's attorney, you said "we went to the police that night." Did I understand you correctly?

A Yes. I believe we went to the police that night.

Q When you say "we," who are you referring to?

A Toni King.

Q Pardon me?

A Toni King.

Q Oh, both you and Toni King went to the Southfield Police?

A Yes.

Q And is that when you're referring to your -- they blew you off?

A Yes.

Q Was that what you're referring to, that meeting with the police?

A Yes.

THE COURT: Could you put up a diagram one more time? I'm sorry. I didn't know whether you two were going to ask the question, and neither one of you did, so I want to ask it.

[Page 59]
BY THE COURT:

Q Well, while I'm waiting, you said you worked with Ms. King for five years?

A Yes.

Q But you only knew Mr. Lancaster for about four or five months before this incident?

A Yes.

Q And did you ever meet him, personally meet him before that?

A Before that? No.

Q Before this incident?

A Oh, yeah.

Q Where?

A Yes. With her.

Q Oh, with her?

A Yes.

Q Where?

A At lunch.

Q Well, you went out to lunch with him other times?

A Several times.

Q Okay. I was going to ask that question. Is that why you said, give me the keys, because you thought those two were going to have lunch together? Why would you -- in other words, what made you think that that was going to happen?

[Page 60]
A Because they ate lunch previous.

Q Okay. So it wasn't anything that he said that day, it's just that you thought it to be like previously, they might be having lunch?

A Yes, yes.

Q Is there any specific reason why you didn't think it would be appropriate for you to join them this time?

A Just for privacy sake, they seemed to have something about a phone bill that they needed to discuss.

Q Okay. But the other times, would you join them?

A Yes.

Q Okay. But this particular time you just thought it wouldn't be appropriate to join them?

A Yes.

Q Because of this discussion about the bills?

A Right.

Q Is that what you're saying?

A Right.

Q Was it a heated discussion? Heated --

A No.

Q -- meaning like argument, an argument.

A No.

Q It wasn't?

A No. Didn't seem to.

Q Didn't seem to be, just that you felt that they needed

[Page 61]
privacy?

A Privacy, right.

Q Okay. The other question I have now, Miss Garner is --

MR. WALTON: Your Honor, I'm sorry, do you want to use the pointer?

THE COURT: Or she can use it.

BY THE COURT:

Q Can you tell me about, where were you, just approximately -- I realize you can't do, do this on a scale, but about where were you when you heard what you thought were firecrackers and turned around?

MR. WALTON: Don't do that, you'll have a headache afterwards. Just push the bottom button right there and then the laser.

THE WITNESS: Okay. The question again?

BY THE COURT:

Q The question was, you said that you were walking towards the coney island?

A Uh-huh.

Q And you heard what you thought to be firecrackers and that's when you turned around.

A Right.

Q And saw your, your girlfriend falling down?

A Right.

Q Where were you, approximately, in that parking lot when

[Page 62]
you made that observation?

A Real close to them, not -- you know, sort of walking slow, dragging my feet and, you know, like in this area here; Not even close to the door. Closer to them than the door.

Q And do you see where your spot, where the laser is right now?

A Uh-huh.

Q How far is that from that point to the door of the coney island. if you could use it facing this courtroom and point out. Do you understand my question?

A Umm--

Q Well, let's do it this way. From your understanding to where that car is when you turned around, about how far were you away, by using this courtroom, point to something out in this courtroom. Say you're, say you're standing, say you're standing where you are now, and that's where you wanted to park it. Where would the car have been when you turned around and see your girlfriend fall?

A Maybe about a little from where she is, at the end of that bench.

Q Over here by the clerk, you mean?

A Mm-hmm.

Q That far away? That's it?

[Page 63]
A Yeah.

Q You were pretty close?

A I was really close.

Q And how far were you from the door of the restaurant?

A I was further away from the door than I was from them.

Q And here again. using this courtroom, about how far away? Can you point out something?

A Where the officer sitting is at. Maybe that far.

Q The deputy back there?

A Yeah.

Q nat's about where the door was and you're here in the parking lot?

A Yeah.

Q And about where my other clerk is, is where Ms. King is when you turned around?

A Right.

Q And the car was about right next to her, basically?

A Yes.

Q Four feet away?

A Oh, yes.

Q And was she on the driver's side of that car?

A Yes.

Q And did you see anybody else in the car other than Mr. Lancaster?

A No.

[Page 64]
Q Okay. Thanks.

MR. WALTON: I have no further questions based on the Court's questions, your Honor.

THE COURT: Okay. Thank you.

MR. MOGILL: Neither do I.

THE COURT: All right.

You may step down. Watch your step.

MR. WALTON: This witness may be excused, then, your Honor?

THE COURT: Do you have any objection?

MR. MOGILL: Not at all.

THE COURT: Okay. You may be excused, ma'am.

MR. MOGILL: While Mr. Walton is getting the next witness, can I have about one minute?

THE COURT: Go ahead.

(Brief pause.)

THE COURT: Ma'am, you want to raise your right hand to be sworn, please?

THE CLERK: In the pending matter before this court, do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

MS. BROWDER: Yes.

THE CLERK: Have a seat.

THE COURT: Please be seated. Just -- they're going to have some questions for you. Okay.

* * *

[Page 93]
{Q = Direct Examination by Mr. Walton}
{A = People's Witness Valera Lancaster}
THE COURT: Go ahead.

VALERA LANCASTER

was called as a witness by the People, sworn by the Clerk to tell the truth, testified:

DIRECT EXAMINATION

BY MR. WALTON:

Q If you could, could you please state your name for the record and spell your last name?

A Valera, I'll spell the first name, too, V-A-L-E-R-A. Lancaster, L-A-N-C-A-S-T-E-R.

Q Is it Miss or Mrs. Lancaster?

A Mrs.

Q Mrs. Lancaster. Mrs. Lancaster, do you know an individual by the name of Burt Lancaster?

A Yes.

Q And how do you know Mr. Burt Lancaster?

A He's my son.

Q And is he seated in court here today?

A Yes.

Q And you can identify him, for the record?

A Yes.

MR. WALTON: Stipulation?

MR. MOGILL: Of course. Yeah.

BY MR. WALTON:

Q Mrs. Lancaster, if I can, I would like to draw your

[Page 94]

attention back to the day of April 21st of 1993. At that time, ma'am, do you remember where you were living?

A 17550 Woodingham, same address.

Q Okay. And that is the east side of Detroit? Or west side of Detroit?

A Northwest.

Q Northwest side of Detroit. And your son, was he living with you at the time?

A No.

Q Your son had a house or an apartment in Sterling Heights?

A He had a condo.

Q In Sterling Heights?

A Yes.

Q Okay. On the date of April 21st of 2000 -- excuse me, on the date of April 21, 1993, did Mr. Lancaster, your son, have an occasion to come to your house?

A I went and got him.

Q You went --

A The night before.

Q Okay. You went and got him the night before?

A Yes.

Q Okay. And when you got -- went to get him the night before, did he drive his car to your house?

A No. I went and got him.

[Page 95]
Q You went and you got him. Where was his car?

A I don't know.

Q Do you know what kind of car he was driving?

A I know the car he always drove.

Q And what was that?

A It was a Mitsubishi.

Q And that was a black Mitsubishi?

A Yeah.

Q Okay. All right. So you drove to Sterling Heights, picked him up and drove him back to your house in Detroit; correct?

A Correct.

Q Okay. And you sat and spoke with him that night?

A In my home, we talked.

Q Yes, ma'am. In your home?

A Yes.

Q Okay. And during the night, ma'am, did you ever go to sleep during the night or did you stay up with your son the entire, the entire time?

A No, I didn't stay up the entire night. I talked with him and I did go to sleep.

Q Okay. So there did come a point in the evening where you did go to sleep; correct?

A Of course.

Q Okay. When did Mr. Lancaster come over to your house?

[Page 96]
When did you go and pick him up?

A I can't remember. It was night. It was kind of late at night. I can't remember the exact time.

Q Was it before midnight?

A Yes, I believe so.

Q Okay. And when you drove to Sterling Heights to pick him up, did you see his, his car in his park -- in his condo apartment complex?

A No, I didn't. I didn't. The reason I went, because he was distraught.

Q Okay. Ma'am, if I can, if you can answer my question.

A Okay.

Q Okay. We can probably proceed a lot quicker that way.

A All right.

Q Mr. Mogill is also going to have the opportunity --

A Okay.

Q -- to ask you questions as well, if he feels that he needs to develop something, or ask you some questions.

A Okay.

Q So when you went to his condo in Sterling Heights, did you see his black Mitsubishi or not?

A No.

Q Okay. You picked him up and you drove him home; correct?

A Yes.

[Page 97]
Q To your house?

A Yes.

Q And you sat and you talked with him; correct?

A Well, I can't say I sat and talked. We talked as we were in the house.

Q Okay.

A He sat.

Q Okay. And there came a point in time where you decided that you were going to go to bed; correct?

A Yes.

Q And you did go to bed: correct?

Q Yes.

Q And the next day, the 22nd, you got up; correct?

A Yes.

Q Okay. Did you wake up at your normal time or did something cause you to wake up?

A No, I think it was my normal time.

Q Okay. Did your son spend the night at your, your home?

A Yes, on a chair.

Q Okay. And at the time, do you know if your son was dating or intimately involved with anyone?

A A young lady named Toni.

Q Toni King?

A Yes.

Q And do you know how long your son and Ms. King had been

[Page 98]
dating?

A I don't -- it was a little while, but I don't remember the length of time.

Q Okay. Was it more or less than a year?

A I -- it might have been a year or less. I cannot say that.

Q Can you approximate the time?

A No.

Q All right. Do you know if your son is right- or left-handed?

A I'm sorry, what did you --

Q Do you know if your son is right- or left-handed?

A He's left-handed

Q He's left-handed. Okay. So if you're sitting in a car, you could -- if he was sitting in his car, his left hand -- let me rephrase the question.

When you were speaking with your son, the next morning -- when you got up the next morning, did you talk to your son at all?

A Yes.

Q Okay. So he was still at your house?

A Yes.

Q Okay. Do you know where he slept that night?

A In a chair, a large, like, ottoman-like chair.

Q Okay. When you spoke with him the next day, did you

[Page 99]
notice any signs that he had been drinking?

A He was drinking beer.

Q Okay. All that night?

A I wasn't up all that night, but it's possible.

Q Okay. Did you notice any remnants of beer, like empty bottles or anything like that?

A There were beer bottles there, yes.

Q Do you remember approximately how many?

A No.

Q Okay. When the defendant -- when you spoke with the defendant the next day, what was his emotional state like at that time?

A He was distraught.

Q Okay.

A That's the reason I went to get him.

Q Okay. No, no, the next morning.

A This morning, he was distraught. Crying.

Q And he spoke to you about what?

A He, he was -- he was mumbling, he wasn't making sense, you know, he was just distraught. He was sick.

Q Okay. You spoke to him about what, ma'am?

A Well, he talked about his life and he was unhappy and he was just crying.

Q Okay.

A He was just sick, that's all.

[Page 100]
Q Okay. So he expressed to you -- is this in the morning or the evening?

A The morning.

Q Okay. He talked to you that morning and he told you that he was upset, he was upset with his life; correct?

A He didn't use the word upset. He just was crying and said, you know, just shaking his head, and you know how people act like that, when they are --

Q Okay. I've seen people upset before. So he was crying, and you were able to notice these physical manifestations of someone, someone being upset; correct?

A I noticed his because I knew his mental condition.

Q Okay.

A I knew --

Q Was he crying?

A Yes.

Q Okay. Was his voice shaking?

A Yes.

Q Okay. He was upset then; correct?

A Yes, extremely upset.

Q Do you know where Toni King worked?

A I knew where he said she worked.

Q Okay. And where was that?

A Supposedly in a dental office on Eight Mile and Greenfield.

[Page 101]
Q Okay. And how far is your house from Eight Mile and Greenfield?

A I have no idea. I have driven it but I never timed it, never looked at the mileage.

Q Okay. Can you give an approximation?

A No. Don't want to do that because I couldn't give you a good one.

Q Do you remember testifying previously as to the rough distances up to that?

A Yeah, I remember you asked me that and that's what I did, gave you a rough distance.

Q And what do you recall indicating last time you testified?

A I don't remember what I said, whether it was a rough distance.

Q Well, what do you recall at this time, ma'am?

A I can't give it to you because I give -- probably give you a wrong figure. I testified a number of times.

Q First of all --

THE COURT: Let me ask you this, ma'am. Do you know what intersections you lived near?

THE WITNESS: I live at Woodingham and Curtis, north -- it's south of Curtis, so I'm kind of along Wyoming, between Wyoming and Livernois.

THE COURT: Wyoming and Curtis?

[Page 102]
THE WITNESS: Hmm?

THE COURT: Wyoming and Curtis?

THE WITNESS: Yeah, and if I go out, I would go out along the Lodge, if I was going out that way.

THE COURT: Well, Curtis is between Seven and Eight Mile, isn't it?

THE WITNESS: Well, Curtis is one mile north of Six -- well, one -- some blocks north of Six.

THE COURT: Okay. So I was wrong. it's between Six and Seven?

THE WITNESS: Yeah. And I was over to the -- because if I was going that way. I would go over to the John Lodge.

THE COURT: That would be, if you were going up to Eight Mile, it would be two miles up?

THE WITNESS: (Witness indicating.)

THE COURT: And then how many miles over? Wyoming is about --

THE WITNESS: Well. I come from Wyoming. Wyoming to --

THE COURT: A couple miles, maybe?

THE WITNESS: -- Woodingham.

THE COURT: Maybe five miles or so?

THE WITNESS: That's possible.

THE COURT: I mean. I'm -- I'll take judicial --

[Page 103]
THE WITNESS: Okay.

THE COURT: I can take judicial notice of this.

MR. WALTON: Okay. Thank you, Judge.

THE COURT: About how far it is.

MR. WALTON: All right.

BY MR. WALTON:

Q Now, do you know approximately what the distance between your house is and Sterling Heights, where your son's house in Sterling Heights is?

A Oh, that was a long ways.

Q Okay. All right. Now, during the night did you ever hear the defendant get up and leave the house?

A He couldn't. I have dead bolts, I have the keys. He had no keys.

Q Okay. So you can dead bolt the house from the inside, you could not get out?

A Right.

Q Okay. And at what point in the morning did you un-dead bolt the doors?

A Let's see, now -- right now I can't remember because I probably had --

Q Okay. We'll get back to that.

A -- to open it sometime or another to look out or do something.

Q Okay. So if I can, you woke up the next morning and

[Page 104]
you're talking to your son. You talked. he indicated to you that he was upset about his life; correct?

A Well, okay. We'll use life, but he was upset because of the other conditions.

Q What other conditions?

A His mental condition.

Q Okay. Did he ever talk to you about the problems that he was having with his girlfriend that morning?

A Well, he said he was unhappy.

Q He was unhappy with her or the relationship?

A He didn't use all those words. He was unhappy.

Q Okay.

A And he was crying.

Q What -- did he indicate to you that he was unhappy with Ms. King?

A Not in those words.

Q Well, what did he say? What words did he use?

A I'm, I'm trying to think the word he did use, because he was crying and just -- well, I don't know what to say to you because I think it was his mental condition that was coming through and if you've ever known a mental person when they're upset and crying, you don't know what they're saying.

Q Okay. So is it your testimony that you had no idea what he was saying, that he was just babbling?

[Page 105]
A Well, some things were being related but it wasn't like you were holding a decent conversation.

Q Okay. Let's talk about the things that he was relating. What was he relating to you? What was he obsessed about?

A I'm trying to remember all these things now. He was upset because he didn't have medication and he had just come -- well, come out of the hospital a few days before. And that was, that was the result of that.

Q Mm-hmm. Which hospital?

A In New Baltimore.

Q Okay. Now, you said a couple days before, so he wasn't with Ms. King a couple days before?

A No. Let's see, it had to be about -- he had been out of the hospital maybe about three days. I would have to have the dates to see, because I went out to get him.

Q Okay. All right. Now, your son was distraught or your son was upset?

A Right.

Q And he talked to you about needing a gun; correct?

A Well, that was way up in the day. I mean, that was – a whole lot happened in between that and him and his condition.

Q Okay. Did your son ever leave your house? That day, the 22 --

[Page 106]
A He left after I left out.

Q Okay. What approximate time was that?

A It had to be sometime that afternoon, I still couldn't remember the time. It was in mid day, it wasn't early in the morning.

Q Okay.

A I can only relate it to the man next door where I went, he had to go get his child from school, so it had to be around that time.

Q Okay. And that would be what time in the day?

A Well, kids usually get out about what, two, 2:30 or three, something like that.

Q So that's your recollection as far as when your son left, was two or three in the afternoon?

A He wasn't there when I went back, let's say when the police and I went back.

Q Okay. All right. When you left the house, you said you left the house and you came back and --

A I went right next door.

Q Okay. And how long were you at the neighbor's house?

A I wasn't there very long because he had to go get his grandchild or something and I made the call to the Detroit Police.

Q Okay. And then you came back to the house; correct?

A I came -- well. I waited for them to come.

[Page 107]
Q Okay. Then you came back to the house?

A I waited outside for them to come.

Q When you walked outside to your neighbor's house, did you see your son's car outside, the black Mitsubishi?

A No.

Q Okay. All right. When you walked out and you said there's no way that your son could have left the house beforehand; correct? Because you had dead bolted the --

A Well. I had opened the door to get out of the house so he could walk out then, if he wanted to walk out.

Q Had anyone come to your house other than your son that evening?

A Not to my knowledge.

Q Okay. Do you know if anyone dropped his car off at your house?

A Not to my knowledge.

Q Did he keep his car at your house?

A Ever? Not at -- well, it wasn't -- let's say I don't know if it was out there at that time.

Q Mm-hmm. Okay. All right. So you wake up in the morning and you talked with your son for how long until you go out of the house?

A I woke up in the morning, I talked with him awhile, I went back to bed because my blood pressure was really up that day. That was the time that I had out of control

[Page 108]
blood pressure.

Q Mm-hmm.

A And I went back upstairs, he brought me an envelope and he said to read --

Q All right. Ma'am, just answer my question.

A Okay. What else?

Q What happened, when your son went -- when you went out of your house --

A When I what?

Q The next day, when you left your house to go call the police.

A Yes.

Q What time of day was that?

A Well. I tried to relate that to you by the child having to be picked up next door.

Q And what time was that?

A Well. I don't know. All I would know about that time is children are usually picked up, maybe between 2:30 and 3:00.

Q So you recall it being approximately two or 3:00 in the afternoon?

A Yeah. I would say that.

Q Okay. All right. Now, before your son left, he talked to you about wanting a gun; correct?

A Before he left.

[Page 109]
Q Yes.

A Sometime in the conversation before I left he talked about wanting a gun.

Q Okay. What did he say he wanted the gun for?

A He said he was going to kill himself.

Q Okay.

A In front of Toni.

Q Okay.

A He was going to take her to lunch.

Q Okay. Wait, wait. You said he told you that he was going to take her to lunch?

A Or that was his hurry to get out of the house, is to go and have lunch.

Q Okay. All right. Now, you remember testifying previously, don't you? In a, in another trial?

A Yes, I testified.

Q In the other trial you never indicated that the defendant told you that he was going to take Toni out to lunch, did you?

A I think I said that you always told me to answer what you asked.

Q Okay.

A I did not elaborate.

Q Did you indicate that the defendant told you if he was going to take her out to lunch?

[Page 110]
A Yes, I told his, his attorney back then.

Q Okay. Not the attorney; I'm talking about, did you testify to that?

A Who would I testify to, then?

Q Before the jury, last time?

A I'm saying, who would be asking me the questions? You?

Q Either Mr. Sowell or myself.

A Yes. I believe I said that.

Q All right. Isn't it true that you had indicated -- okay. Your testimony, though, today is that he told you that he was planning to meet her for lunch and he was going to kill her in front of him?

A Yes. That was what he wanted to do.

Q Okay. That's what he told you?

MR. MOGILL: Excuse me. The question --

THE COURT: I think he was going to kill himself in front of her, not kill her.

MR. MOGILL: Yes, it mischaracterized the testimony.

THE COURT: I think he misspoke.

MR. MOGILL: Okay.

THE COURT: Is that what you meant?

MR. WALTON: You -- he told --

THE COURT: Wait. Excuse me.

MR. WALTON: Yes. Yes.

[Page 111]
THE COURT: She said he was going to kill himself.

MR. WALTON: Yes, yes.

THE COURT: In front of her. Okay.

BY MR. WALTON:

Q He told you that he was going to go and meet her and kill himself in front of her?

A Yes, he wanted to do that.

Q Okay. And he didn't have his car there?

A I didn't see his car; let's say that.

Q Well, you picked him up the night before, right?

A Right. I didn't see his car.

Q Okay. All right. And when he told you that he wanted to kill himself in front of Ms. King, he started going up the landing towards a closet that you keep locked; correct?

A Yes.

Q Okay. What's in that closet?

A Oh, just clothing and I always kept my gun on the top shelf.

Q Okay. Do you recall what type of gun?

A I believe that was a .357 Magnum.

Q Okay. A Ruger, a .357 Magnum?

A No, I don't know about the Ruger.

MR. WALTON: May I approach the witness?

THE COURT: You may.

[Page 112]
BY MR. WALTON:

Q Ma'am, I'm going to show you what has been marked as People's proposed Exhibit Number 8 in this case and ask you, is this your weapon?

A It could be.

Q Okay. Is this --

A It's been a long time.

Q Okay. Is this the type of weapon that you kept in your closet?

A It looks familiar.

Q Okay. And you kept the gun in the closet loaded, correct, for your safety? Protection?

A Yes. Yes.

Q And you in fact kept the closet locked; correct?

A No, I -- well, it was a lock. It was a lock children couldn't get in.

Q Okay. Was the lock to prevent the children from getting in activated? Was it locked?

A The closet was locked, he pushed the panel out in the middle. He didn't have to push the lock, the panel was pushed out.

Q Okay. So the, the door, then, was broken?

A No. The door wasn't broken, the panel was pushed out.

Q Okay.

A These are the doors with panels in them.

[Page 113]
Q Okay. So he pushed out the panel; correct?

A Yes.

Q And when he starts going up the stairs towards this closet, is that when you run from the house?

A That's when I left the house and went next door, because I told him I'm going to call the police.

Q Okay. Now, in your house do you have a telephone?

A Yes.

Q That is, your telephone worked that day?

A I believe it did.

Q Okay. You did not call the police from your telephone; correct?

A No.

Q You went to a neighbor's house; correct?

A Yes.

Q Okay. So you took the time, knowing that you're the only person with the keys to the door, you took the time to unlock the door and go next door; correct?

A Yes.

Q Okay. And you called 911?

A Yes.

Q And do you -- you were upset at the time?

A Yes.

Q You were very emotional at the time?

A Yes.

[Page 114]
Q What do you recall telling the police?

A I told them my son was going to kill himself and his girlfriend.

Q Okay. And you in fact told the police where his girlfriend worked; correct?

A I told them where I thought she worked, yes.

Q Okay. And you -- did you describe to the police what he was wearing?

A I, I can't say that. I don't remember saying that.

Q Okay. When you called the police, this is 911; correct?

A Right.

Q The police arrived at the scene?

A Right.

Q Okay.

A They eventually arrived.

Q Okay. When the police arrived at the scene, do you go back into your house?

A Yes. No, we didn't go in the house. Detective Rabbie(phonetic) put me in his brown scout car and -- wait a minute. They went -- or what they did, how they do that. I think when they arrived they went up to the door and they called Burt to see if he was in there. He wasn't in there. And Detective Rabbie put me in his brown scout car, took me down the street a block, about. And he talked to me about Burt and asked me things about

[Page 115]
Burt and if I knew this and if I knew that.

Q Okay. And that's when you told them that where they -- where Toni King worked; correct?

A After this.

Q Okay. All right. Okay. Now, do you remember indicating -- okay. Eventually, are you able to get back into your house?

A Well. yes, Detective Rabbie came back with me.

Q Okay.

A And he went in and then after that quite a few detectives came, the police in plain clothes or whatever they were.

Q And when you came back in the house, you -- you had an opportunity at some point during the next few minutes or that day, to pick up the phone and see if it was working; correct?

A No. I think Detective Phillips used the phone.

Q Okay. Well, do you remember indicating to the police -- excuse me. When you -- did you ever pick up the phone at that time?

A No.

Q Do you remember testifying in the previous occasion indicating that:

"I thought something was wrong with my phone, because I had come back into the lower part

[Page 116]
of the house to listen for him and when I picked up the phones they were not working, the one downstairs?"

A I don't know, I've got a lot of phones. I could have said that.

Q Okay. So at the time when you testified, you had indicated that at least one of your phones wasn't working downstairs; correct?

A That could have been possible.

Q And in fact, you actually went through the process of having the phone company out, come out and check your phones; correct?

A Yes.

Q That day?

A And they didn't find anything wrong.

Q Okay. All right. So there was a problem with the phones that caused you to call the phone company to have them come out?

A I don't know that.

Q Okay. Well, you know at least one phone didn't work; correct?

A Yes.

Q Okay. Now, would that have been the closest phone for you to call the police if you were downstairs, before you went outside?

[Page 117]
A Well, I had three phones downstairs at that time, so I'm trying to think which one. I probably went to the

living room but I didn't stay around too long. I didn't intend to stay around too long.

Q Okay. All right. Now, when you picked up the defendant from your -- from his house in Sterling Heights, he had a jacket; correct?

A A jacket?

Q A jacket.

A No, I don't remember if he had a jacket on or not.

Q Okay. Do you remember testifying previously at the trial, indicating that your -- that an item shown to you was the defendant's jacket?

A It could have been.

Q And he was wearing it on 4/22?

A It could have been. I probably gave them a description of exactly what he had on.

Q Okay. And you would have given that description to the police; correct?

A If that's what he had on, I would.

Q Okay. Ma'am, I'm going to show you what's been marked as People's proposed Exhibit Number 10 in this case and ask you, can you identify this for the record?

A I have seen that jacket before.

Q Okay. Do you remember this jacket being shown to you at

[Page 118]
the prior trial when it was referred to as People's Exhibit Number 16, and identifying it as your son's jacket?

A No, I don't, but I don't deny that's his.

Q Okay. Now, when you came back into the house after calling the police, Mr. Lancaster wasn't out there, right?

A Right. Well, when we came back into the house.

Q You saw the door to where the guns were kept was pushed in; correct?

A One gun.

Q Okay. You saw that that door was pushed in; correct?

A Yes.

Q Okay. And the handgun that is usually kept in that closet was missing; correct?

A Yes.

Q Now, is that handgun kept under anything like blankets or anything like that?

A No.

Q No?

A No.

Q It's just sitting in the open on top?

A It was sitting on the top shelf, you could see the handles, you know.

Q Okay.

[Page 119]
A It wasn't hard to get to if you could get in the closet.

Q Okay. All right. But the lock hadn't been unlocked, the panel had been pushed in; correct?

A Yes.

Q Okay. All right. And you noticed that the gun was missing; correct?

A I didn't notice, notice, I know what he said. He headed upstairs to get it and that's when I left.

Q All right. The -- your gun wasn't in the house, was it?

A It wasn't there when we went in.

Q Okay. All right. Did you see your son leave your house?

A No, because I was in the house next door.

Q Okay. All right. You didn't look out the window or anything like that?

A Where his phone was, is in the kitchen, and there was no way -- the man has to pass all -- his living room is in the front, his phone was in the kitchen.

Q Okay. All right. Now, after your son had let out -- left, left your house or he wasn't there anymore, and after the police came and spoke with you, you indicated, I think it was Detective Rabbie --

A Yes, I --

Q -- spoke, spoke with you?

A Yes.

[Page 120]
Q Did you receive a telephone call from your son?

A I received that call while Detective Phillips was there and two other detectives and -- in fact, there was quite a few people in the house at that time.

Q Okay. And he made that phone call approximately in the middle of the day; correct?

A I don't know.

Q Okay.

A I can't remember what time.

Q Okay. Do you remember previously being questioned as to when this first phone call was made and you testified previously that it was the middle of the day?

A Probably so. 10 years ago, I might have known.

Q Okay. Well--

MR. WALTON: May I approach the witness?

THE COURT: You may.

MR. WALTON: Thank you.

BY MR. WALTON:

Q Ma'am. I'm going to show you page one, page 168 of Volume II of IV, and I'm going to refer your attention first to line 17 on this page.

A Mm-hmm.

Q And then read down to, to your answer and see if that first refreshes your recollection. Read it to yourself.

A Now, where, you going to start at 15? Is that the one?

[Page 121]
Q Yes.

(Witness complies.)

A Well, approximately. What that has --

Q So it was your former testimony that your son had called you at approximately the middle of the day?

A Well, at that -- I could have said that. I don't deny that. I don't remember all the times from 10 years ago.

Q All right. Now, at that time when you spoke to him on the phone, did he not indicate to you that Toni was gone?

A I don't remember that. Detective Rabbie was the one that told me she was -- how bad she was and that she was dying.

Q Okay. How long did this phone call last?

A Not very long.

Q And in fact, you were able to determine the defendant had called you from the pay phone; correct?

A I -- probably so.

Q Well, do you have any independent recollection now as to --

A If I said it was a pay phone, evidently I heard or traffic or maybe I asked him. So if I said it was a pay phone, I had a reason to do it.

Q Well, it's kind of important. How did you determine that he had made the phone -- to call on a pay phone?

[Page 122]
Was it a collect call?

A Oh, no, it wasn't a collect call. I don't think it was a collect call.

Q Did you ask him, are you calling from a pay phone?

A I don't remember if I did. You know what, Detective Phillips was beside me, because he was telling me

what to say and what to do, because he wanted to put a tracer on the line.

Q Okay.

A And the phone company refused to do it.

Q You indicated, when you were asked last time about the call in the middle of the day, that he had made a phone call from a pay phone -- from a pay phone to me; correct?

A Well, Detective Phillips asked me to do it.

Q No, no, no, ma'am. My question is, you testified in front of Judge Howard that the defendant made a phone call to me from a pay phone?

A Well, I won't deny that, either.

Q Okay. You said the phone call didn't last for very long; correct?

A No.

Q Okay. When is the next time that you heard from your son?

A I think it was late at night. And that's when his

[Page 123]
attorney went and got him and returned to them.

Q Okay. Actually, there were three phone calls from your son --

A Was there?

Q -- to you; correct?

A I don't remember being three phone calls.

Q Okay.

A You have to tell me.

Q Do you remember indicating last time that you testified that there were a total of three phone calls until the last one, when you contacted his attorney to go and get him?

A If you said it was three and I testified at the time, I knew that, because it was familiar.

Q Okay. So you don't remember today?

A How would I, 10 years or 12 years later?

Q All right. Ma'am, I'm going to ask you if you could read your response, where it indicates answer, page 171, beginning on line nine. Read nine to 11 to the Court a loud.

A Where is nine?

Q The letters are on the side, nine to 11.

A Okay.

"I believe I received in a total of three calls up until the last call he made where his

[Page 124]
attorney and I went and got him."

Q Okay. I'm going to actually leave this here because I may, you may refer to it at different times.

Now, the second time that he had called you, do you recall approximately what time of day that was?

A No, I don't.

Q Okay. The last phone call that he made to you, the last time he spoke with him on the phone, where you went and you contacted his attorney, Mr. Sowell, do you remember approximately what time of day that was?

A It was night. I can tell you that. I don't remember the time.

Q Okay. And at that time you spoke with your son and you agreed to go and pick him up; correct?

A I agreed to call his attorney.

Q Okay. You agreed to call his attorney.

A And it's after I picked his attorney up, and we went and picked him up.

Q Okay. So you took the time to call the attorney, and then you and the attorney went and got your son?

A Right.

Q And he told you where he was; correct?

A Correct.

Q You were able to drive where he was?

A Correct.

[Page 125]
Q And he told you?

A Yes.

Q And was he where he says he was?

A Yes, he was.

Q Okay. All right. So you pick him up and at that time he has with him a gun; correct?

A Right.

Q And that gun was given to the attorney; correct?

A Right.

Q Okay. And yourself, your son, and his attorney then drive to the, the Detroit Police Department; correct?

A Yes.

Q Okay. And your son is turned in at that point, or --

A Right.

Q Okay. And the gun is then turned over to the police; correct?

A Evidently.

Q Okay. Did you ever look at the gun while in the car?

A No.

Q In picking him up?

A No, the attorney handled the gun.

Q All right. All right. Now, between the time you get these series of phone calls, after you get the first phone call from your son, you indicated that a Detective Phillips from Southfield came and spoke with you at some

[Page 126]
point?

A He was there almost from the beginning.

Q Okay.

A Because once this happened, Southfield came out.

Q And at the time was your emotional state still one of you were upset, emotional?

A Yes. Yes.

Q Okay. So a lot of things were going on that upset you, right?

A Yes.

Q Okay. And in fact, during this, this time that you received this first phone call, or after you received this first phone call from detective -- from your son, you then had the opportunity to write out a statement for Detective Phillips; correct?

A Right. No, I did not write that out for him, I wrote it for a heavyset Caucasian detective that came to my

house after dark. I don't know -- I don't remember his name at all.

Q Okay. Were you still upset at the time you wrote it?

A Very upset.

Q Still emotional?

A Yes.

Q Still worried about your son?

A Of course.

[Page 127]
Q Do you remember what you wrote?

A Yes.

Q What did you write?

A You just want to know what I wrote or what preceded the writing or what?

Q No. I just want to know what you wrote.

A I wrote what it said on the statement.

Q All right.

MR. WALTON: May I approach?

THE COURT: You may.

(Brief pause.)

MR. MOGILL: What number did you use?

MR. WALTON: I think 12.

THE COURT: Well, you had through 8.

MR. MOGILL: We didn't have a 9.

THE COURT: We don't have a 9 or 10.

MR. MOGILL: 10 is the jacket that hasn't been -- he hasn't moved for its admission.

THE COURT: You're going to move for the --

MR. WALTON: Right. Okay. I'll give it 11, then.

BY MR. WALTON:

Q Ma'am. I'm going to show you what's been marked as People's Exhibit Number 11 in this case and ask you, is that the statement that you wrote?

A Yes. Same one I looked at the last time.

[Page 128]
Q Okay. And when you wrote that statement, you were very upset; correct?

A Yes.

Q You were very emotional; correct?

A Yes.

Q Would you please read that statement into the record, please?

A I say:

"Eight a.m. until about, between 11 a.m. and 12 noon, Burt and I talked at length about life and dying. We talked about his past up to the present. He felt Toni, the deceased, had lied and neizled(sic) him, misled him. He felt so hurt by his longstanding relationship that he felt he should not live."

Q That "she" should not live?

A Yeah. Yeah. Okay.

"He said he was going kill her and himself today. He stated he needed a gun. I told him he could not have my guns and he attempted to take them I would call and in fact -- well, I told him if he attempted to take them I would call the police."

Q Mm-hmm.

A "He said he was sorry, but he had to take my gun. which

[Page 129]
was in a locked closet. He broke the door down and went next -- and I went next door to call the police because he had disconnected the wire to my phone."

Q Okay. All right.

MR. WALTON: Move for its admission, your Honor.

THE COURT: Any objection?

MR. MOGILL: No objection.

THE COURT: It's 11? 11 is admitted.

MR. WALTON: 11, your Honor.

THE COURT: Okay.

MR. WALTON: Your Honor, I have no further questions.

THE COURT: Go ahead. You may. We'll stop at 4:30.

MR. MOGILL: Okay. I'm happy to start.

CROSS-EXAMINATION

BY MR. MOGILL:

Q Ms. Lancaster, before we talk about the events of April of 1993, I would like to ask a few questions about yourself and your background, if I might?

A Yeah.

Q You're how old, as of today's date?

A How old am I?

Q Yeah.

A 79.

[Page 130]
Q Okay. And you have given birth to five children; is that correct?

A Yes.

Q And Burt is the youngest, isn't he?

A Yes.

Q You have -- if you could tell the Judge your educational background, Mrs. Lancaster?

A Well, I have a master's in public relationship(sic), but I went all through what you had to do to get there. And I worked for the Building and Safety Engineering for the City of Detroit, I was a field inspector and a court officer every Friday, took cases to court.

Q How long did you work for the city in that capacity?

A 20 years.

Q So you raised a family and went all the way through college with bachelor's and master's degrees; is that correct?

A Yes.

Q Your master's degree is from what school?

A Last one, Central Michigan University.

Q Okay. It's correct, is it not, that there is in other -- there has been in others in your family tree, and in your -- and in your family, a history of serious mental illness?

A Yes.

[Page 131]

MR. WALTON: Your Honor, at this point I'm going to object as to relevance.

THE COURT: No, I'm going to allow him to make a record. It's a non-jury trial. Go ahead.

MR. MOGILL: Thank you, Judge.

BY MR. MOGILL:

Q You have a brother, okay, a brother who had serious mental problems; is that correct?

A A brother?

Q Yes.

A Well, I had a young brother that was sick.

Q Okay. And his first name was?

A Was Jack Walker.

Q And tell the Judge, please, the nature of his mental problems and when they first started to appear?

MR. WALTON: I object, your Honor, I don't know that the witness is qualified as to --

THE COURT: I don't know that she would be. He can give a brief layman's description, if he wants to, but I'm sure she can't testify as an expert.

MR. MOGILL: Right.

THE WITNESS: Well, you're talking about my brother, that was years ago when they didn't have too good of psychiatric help. He used to go to a psychiatrist, my mother would take him and he would have

[Page 132]
outbursts and break things. And he never learned to read very well.

BY MR. MOGILL:

Q Never made it through high school, did he?

A No. Grade school, either.

Q Your -- you have been married?

A Two times.

Q Okay. And Mr. Lancaster's father was quite a reclusive man, wasn't he?

A Yes. I think he needed help, too. It's the reason I left.

MR. WALTON: Your Honor; I certainly know, I know defense counsel is attempting to make a record but I'm going to have a standing objection as to this. I understand the Court's ruling.

THE COURT: I understand.

MR. WALTON: All right. Thank you, your Honor.

THE COURT: And I'm, I'm not going into a lot of detail, but I think a record should be made.

MR. WALTON: Thank you, your Honor.

THE COURT: Because of the issues that are involved.

MR. MOGILL: Thank you.

THE COURT: Go on.

BY MR. MOGILL:

[Page 133]
Q He didn't relate well to people?

A His father?

Q Yeah.

A No. he didn't.

Q He wanted to be by himself?

A Yeah.

Q And as you have indicated, it appeared to you that he needed serious mental health treatment as well; isn't that correct?

A Yes. he did.

Q The age gap between your oldest child and Burt is how many years?

A Well, Sheila was born in '53. and Burt was born in '60. So I would say 13 years or something like that.

Q Okay.

A '53 and --

Q If I remember correctly --

A I'm sorry, Joseph. That's Joseph was next to him. That was Joseph. he was born in '56.

Q Right. Your, your oldest child was born in '44?

A Yes.

Q Okay. And that was Diane?

A Yes.

THE COURT: Excuse me. You can't testify, ma'am.

UNIDENTIFIED SPEAKER: Oh. I'm sorry.

[Page 134]
THE COURT: That's all right.

MR. MOGILL: Thank you. I apologize.

THE COURT: That's okay.

BY MR. MOGILL:

Q And then you had a second child, Velar, V-E-L-A-R, in 1946?

A Yes, '44.

Q Sheila in 1953?

A Yes.

Q Joseph in 1956?

A Yes, that was Joseph.

Q And Burt in 1960?

A Yes.

Q Both Sheila and Joseph had very serious mental health problems too; is that correct?

A Yes, they did.

Q Would you tell the Judge, please, the nature of Sheila's problems and when they first started coming out?

A She was schizophrenic and she committed suicide.

Q At, at what age?

A Gosh, you know, I, I don't remember right now. It's been quite awhile ago.

Q She took an overdose of pills; isn't that correct?

A Yes. They gave her a big bottle of pills like they always do and she took them all.

[Page 135]
Q And Joseph, tell the Judge about Joseph's mental health.

A He killed himself, too. He was, I guess he was probably schizophrenic, too.

Q He killed himself while Burt was a police officer?

A Yes, he did, and Burt went and identified him.

Q Now, when Burt was corning up, he was in grade school?

A Yeah.

Q Was he in regular classes throughout or was there a period of time he was in special ed classes?

A He started out in special ed.

Q And he stayed in special ed for about three years, didn't he?

A Yeah.

Q And during that time he was tested more than once, wasn't he?

A Oh, yes.

Q I mean, they regularly tested him?

A Right, they did.

Q Okay. And he was tested for his IQ, among other things; isn't that right?

A Yeah, mm-hmm.

Q And his IQ test showed -- I'm sorry, Mrs. Lancaster, I know this is very difficult. Do you need a minute?

A No, I'm okay.

Q Showed an IQ in the mid 80s: is that correct?

[Page 136]

MR. WALTON: Well, your Honor, again, I think I'm going to object. That's hearsay.

THE COURT: That would be.

BY MR. MOGILL:

Q In any event, the IQ testing and other tests were such that he had to be in special ed for a period of time?

A Yes.

Q But he was able to make it through high school?

A Right.

Q While he was in high school, did he start exhibiting signs that, in your lay opinion, in your opinion, obviously not a psychiatrist --

A He always kept to himself, you know, he never went out, got involved with other kids or anything like that.

Q When was the first time that Burt started saying anything or doing anything that led you to think he was thinking about suicide?

A Well, after he became a police officer, that was -- that was too much stress on him.

Q Mm-hmm.

A Because he often talked about the things he saw and how, how it affected him and he just didn't think the world was a very happy place.

Q Okay. Were there times when he absolutely tried to, to your knowledge, to take his own life?

[Page 137]
A Seriously, I can't remember offhand, you know, but it's just that he would -- he would just sit alone, you

know, and I can't -- let's see, when did he take -- you know, all of that just seems to be a blur to me.

Q Okay. Would it -- it's correct, is it not, that on one or more occasions he either tried to cut him -- cut his wrists or take an overdose of pills?

A Yeah, he did that, but you know. So he didn't succeed at that.

Q But without, without succeeding?

A I saw about asking help, you know, so he wasn't trying very hard, because his sister and brother knew how to do it, they did it.

Q Yes. He started seeing a psychiatrist or a psychologist quite some time before the events that had brought us to court today; isn't that correct?

A Yeah, he was discharged from the department because of his condition.

Q Okay. Both, both, both his mental health condition and --

A And his --

Q -- a serious physical injury --

A Right.

Q -- that he sustained while on duty; is that correct?

A Right.

[Page 138]

THE COURT: He was what? I missed what you said. What was it? I didn't hear what you said. He what?

THE WITNESS: Discharged -- not discharged, he was retired from the police department.

THE COURT: He was not an active police officer at this time?

THE WITNESS: No.

THE COURT: Okay.

THE WITNESS: He was off on --

THE COURT: Medical leave or something?

THE WITNESS: -- disability.

MR. MOGILL: No, he had been -- if, if I can represent to the Court, he had been retired from the police department for both mental health and physical disabilities.

MR. WALTON: Your Honor, I'm going to have to object. that's hearsay. And I would disagree with why he was discharged.

THE COURT: All right. Well, you're going to have to put some evidence in, then, to substantiate that, then.

MR. MOGILL: Well, which gets us to the question that I need to -- I'm at the point where I would now

turn to the events immediately prior to April 22nd and that's going to take more than five minutes. This might

[Page 139]
be a convenient time for a break.

THE COURT: All right. If you want to -- that's all right. I have been going all day, I haven't had a break, really. So I will --

MR. MOGILL: Okay. And I've got a question for you, Judge.

THE COURT: Go ahead. You may -- you can step down, ma'am, in the meantime. Ma'am?

THE WITNESS: Oh.

THE COURT: You may step down. Watch your step, though.

THE WITNESS: Okay.

THE COURT: Help her out.

(Witness was excused.)

THE COURT: You want to continue on the record with something?

MR. MOGILL: Yeah. I've, I've got a question because --

THE COURT: Go ahead.

MR. MOGILL: I'm just going to wait until the witness is out.

(Brief pause.)

MR. MOGILL: You just made a comment that, that I wanted to make sure I understand where you're at. It had been my intention, my understanding that I was going

* * *

STATE OF MICHIGAN
IN THE SIXTH JUDICIAL CIRCUIT COURT,
COUNTY OF OAKLAND

93-127632-FC

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Oakland County
Judge John J.
McDonald
People V Lancaster,
Bur

THE PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff,

-versus- File No. 1993-127632-FC

BURT LANCASTER,
Defendant.
_____/

TRIAL

Proceedings had in the above-entitled matter held Before the Honorable John J. McDonald, Judge for the Sixth Judicial Circuit Court, County of Oakland on Tuesday, May 24th, 2005 (2nd day) only.

APPEARANCES:

PAUL WALTON
Assistant Prosecuting Attorney
Appearing on behalf of the People

KENNETH MOGILL
Attorney-at-Law

Appearing on behalf of the Defendant

LYNN E. ERICKSON, Court Reporter, CSR-0188
Received Jan 17 2006
Second District
Sandra Schultz Mengel
Chief Clerk

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6th Judical Circuit Court
County of Oakland, Michigan
Tuesday, May 24th, 2004
(2nd day)

* * *

THE CLERK: Calling the case of People versus Lancaster.

MR. WALTON: Paul Walton, on behalf of the People, your Honor.

MR. MOGILL: Good morning, Judge, Kenneth Mogill, appearing on behalf of Mr. Lancaster, and we are prepared to go forward.

THE COURT: You may proceed.

MR. MOGILL: Thank you.

If it please the Court, at the time we broke for the afternoon yesterday, I had asked a number of questions; one of which concerned the circumstances of Mr. Lancaster's departure with the Detroit Police Department.

Mr. Walton had an objection, that was, I think, in addition to the other standing objection he had, and I think --- at this time I think it is appropriate for me to withdraw the question that I asked Miss Lancaster, since I think she is not the appropriate witness for me to pursue that.

[Page 4]

So, I want that to go on the record. With that, I am prepared to continue.

VALERA LANCASTER

HAVING BEEN PREVIOUSLY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, WAS EXAMINED AND TESTIFIED FURTHER AS FOLLOWS:

CROSS-EXAMINATION — CONTINUING

BY MR. MOGILL:

Q Miss Lancaster, I would like to ask you, if you could, please, to return your memory, if you could, your attention, to April 21, 1993.

And, did there come a time on the evening of April 21, 1993 when you received a phone call from Burt?

A That was the date of the incident?

Q The day --- the night before; yes.

A I received a phone call to come and get him.

Q Okay.

And, how did he sound when he called you?

A Well, he was in bad shape, because he had been in bad shape since he got out of the hospital.

Q Okay.

When had he gotten out of the hospital?

A Three or four days earlier, because they

[Page 5]
discharged him and gave him enough medication to get to a doctor, back to the original doctor.

And when we attempted to go back to the original doctor, he refused him because he said he should have come to him in the first place, and he said to go back where he came from.

And, at that time we did go back up and try to re-admit him and he refused to admit him. And that doctor, at the hospital ---

Q (Interposing) So Burt was in bad shape on that night?

A Yes.

Q What was his emotional state that you could tell from listening to him on the phone; could you describe it for the Judge, please?

A Crying, as usual, and you know, they talk but you don't always understand what they say. He was crying, he told me he needed his medication.

Q And, was it clear to you why he wanted you to come and get him instead of him just driving over to your home?

A No. I did not ask him.

Q Okay.

A I'd been out before, because that time before that I went out he had a gun, a rifle in his mouth.

[Page 6]
Q How --- how soon before this--

A That was before this call.

Q Yeah, about how long before?

A It was a couple of days before. All of this happened when he got out the hospital and he couldn't get any help.

Q Okay.

You brought him back to the house?

A Yeah. He said he had to come back, he had to come back.

Q Okay.

Did you have a sense of whether he had been sleeping or not in the past couple of days?

A Well, --- he didn't look good. Let's say he didn't look like he had been sleeping. He just looked --- he looked like you look when you're in that kind of condition and if you've ever been around a person that had a mental problem they look bad all the time.

Q Would it be fair to say that he looked distraught?

A Worse than distraught; yes. They have a very haggard look in their face.

Q Was he able to sleep while you were still --- you know --- let me phrase that again.

You got back to your house, what did you

[Page 7]
do?

A Well, we went in and he went into the dining room and that's where he was sitting in this --- like an ottoman chair.

Q Okay.

A And that's where he had beer. I didn't count the beers he had, but that's where he sat and drank beer. And he was asleep at night, and like I say, eventually I went to sleep.

Q Did you get up to check on him at all during the night?

A What is it?

Q Do you recall whether you got up to check on him at all during the night?

A I did come down, and he was awake at that time.

Q What was he doing?

A Sitting there. Just sitting there.

Q Staring off into space?

A Yeah, he was just sitting there and crying, as usual. I don't know when I didn't see him not cry.

Q When you got up in the morning was he awake or asleep?

A He was awake.

Q Still in the chair?

[Page 8]
A Yes, still in the chair.

Q Did --- when you got up in the morning, did you have an errand to run outside the home?

A Did I do what?

Q Have an errand to run outside the home?

A No.

Q Okay.

Did there come a time --- when, during the morning, did he first say anything about a gun?

A That was after --- Let's see. I went back to bed and I went downstairs, I believe, and he was still in the chair. And I --- as I said, that was the time my blood pressure was really out of whack, and I took my pills and went back up to bed.

He brought a note up to me in an envelope and he said it was a note and his license and everything. After I opened it I saw what it was.

Q What was it?

A It was a suicide note, and he told me he didn't need these things any longer. And ---

Q (Interposing) How did that make you feel?

A Well, I didn't feel too good about it, because it could have been a possibility, because other

[Page 9]
things have happened of that nature.

So, I did, eventually, come downstairs and --- I was at the top of the stairs and he was sitting at the bottom --- sort of sitting at the bottom, and that's when he was talking to me from the bottom and I was at the top.

Q How was --- do you remember how he was sitting at the bottom of the stairs?

A I think he was sitting on the bottom of the -- let me get that straight in my mind; let's see?

No, it was just the opposite. He was at the top of the stairs, I'm at the bottom, because I am looking up at him.

Q Okay.

A And that's when he was talking to me. We were talking back and forth to each other.

Q About what?

A About his feelings. No one would help him, and he wanted to die. He didn't have anything to live for and he talked about his brother dying and what not, you know. He knew what they had done.

And he said, 'I have to have your gun.'

And I said, 'Well, you can't have my gun.'

And he said, 'Well, I have to have a

[Page 10]
gun.'

And I said, 'Well, if you take mine I'll call the police.'

Q Why did you tell him that you would call the police?

A I didn't want him to kill hisself. For one thing, I didn't know whether he would kill hisself right there.

Q What happened next?

A Well, he turned around and he knew where the gun was, and he went to --- you know. I could see where he was going. So that's when I left the house and went next door.

Q Okay.

Before that time when he went to the closet, he broke into the closet to get the gun; is that right?

A He pushed the panel in, and it was a narrow door; it wasn't a regular door.

Q Before he pushed the panel in and took the gun, had he said anything at all about Toni?

A He was --- he told me --- he kept telling me he had to go. He did say he had to go to lunch, he had to meet her for lunch. That's what he said.

And, oh, what was he talking about? He

[Page 11]
was talking about life, you know, and just a lot of things. And all of the things I don't remember now.

Q Do you remember if he said anything abut his relationship with Toni?

A He said he loved her. I mean, he always said he loved her.

Q Did he say anything about killing her?

A No, he didn't say anything to me about killing her. He wanted to kill hisself in front of her.

Q But, he went to the closet and broke in and took the gun, you went next door to call the police?

A Yeah.

Q And we have already heard, I just want to confirm from you, it's correct that when you called the police you told them that he was going to kill Toni, as well as himself; right?

A Yes.

Q Would you explain to the Judge why it is that you told the police he had said he was going to kill Toni as well as himself, when he hadn't told you that?

A I told them that because I figured that if I magnified it they would come out right away and get to him before he could leave the house.

[Page 12]
Why it is that you felt that you needed to magnify it in order to get them to come out quickly?

A Well, that was the era where the police were not doing too good in Detroit. And they make runs when they felt like making runs and they would be quite a long time coming to your house. And that's why I said that, to make sure that ultimately they would listen to that.

But, their response to me --- they didn't seem to be excited and they weren't, I guess, because it took them quite awhile to get out.

Q That was going to be my next question. How long was it between the time you called the police and the time any police car carne to your home?

A Ah --- the police car --- the plainclothes, they had --- they had their street clothes on and that was Falk and Racy (phonetic).

Q Okay.

Now, how long was it after you called that they got there?

A I --- it was quite awhile, because I made a comment to them about it. And they said, 'Well, we don't have many police, you know.' That was one of the bad times in Detroit when they didn't

[Page 13]
have a lot of police and the service was bad.

Q Okay.

And the last question I want to ask you about this. Can you put any kind of a number on how many minutes it was?

A Oh, God.

Q And, if it's not something you can put a number on, I don't want to ask you to guess.

A You really can't, because it seems like forever when you're waiting for something.

Q Okay.

A And, I do know --- I said something to them and he acknowledged, 'Well, you know the police.'

Q Okay.

When you got back to your home, after calling the police from the neighbor's home, was Burt there?

A I didn't go inside and neither did they, because they met me out front in the street because I stayed outside.

Q Okay.

And, they went in at some point?

A Yeah. And they went in and they --- I went with them and they called for Burt.

Q He wasn't there, was he?

[Page 14]
A No, they went all over the house.

Q Okay.

When was the next time you heard from Burt?

A Well, it was sometime that day. It seemed like I had all the times wrong on that day. Sometime that day I remember because there was some other detectives was there. Detective Phillips was there.

Q How did Burt sound at that point?

A He was crying and he sounded distraught.

Q What did he say?

A You know. I don't remember exactly what he said.

Q Okay.

But the best you can remember, the gist of it?

A I think I asked him where he was. He said, 'I can't tell you where I am.'

Q He didn't want to tell you or that he didn't know where he was?

A He just said. I believe he said, 'I can't tell you where I am.'

Q Okay.

Did he tell you anything else?

A No. No, he didn't. I don't believe --- no, I

[Page 15]
don't think I asked him that much.

Q Did he tell you anything about Tom?

A No, he said that --- he did say, 'I got to go.'

Q Okay

And, is it your best memory that there were a total of two, or a total three phone calls that afternoon and evening from Burt?

A I thought it was two.

Q But, it might have been three?

A Because Detective Phillips one time called, I talked. And they were all short and they called the phone company back and asked them would they trace the call.

Q Right.

A And the phone company refused to, and said they couldn't do it.

Q Okay.

It's possible you made that third call, but you didn't, as you sit here now, you don't remember that; would that be a fair statement?

A That he made another call?

Q That you don't remember, one way or the other, whether there was a third call or not?

A A third --- no. I don't remember how many times it was really.

[Page 16]
Q Okay.

Now, you've got --- at the end --- by the end of the evening you and Mizell Soul went, after Burt's last call, he told you where to pick him up and you went and you turned him in ---

A (Interposing) That was the last call.

Q Yeah. And you went and you turned him into the Detroit Police.

A Right.

Q And. Burt had given Mr. Soul the gun, and Mr. Soul turned over the gun to the police as well?

A Yes.

Q All right.

The last area I want to ask you a couple of questions about. Mrs. Lancaster, is after the events of that afternoon, the police asked you to make a statement, again; isn't that right?

A Late in the evening, like I said, a Detective came over.

Q Okay.

Was that --- do you know which Detective that was?

A The only way I could describe him was a heavy set Caucasian man and I didn't get a card from him, so I don't know who he was.

[Page 17]
Q Okay.

And did you write out a statement at that time?

A He asked me to.

Q Okay.

Did you do that?

A I admitted him to the house and he told me he wanted to talk to me about this, and he would like me to write a statement.

Q Mr. Walton showed you ---

A (Interposing) Yeah.

Q (Continuing)... on the sheet yesterday ---

A (Interposing) Um-hum.

Q (Continuing)... that you had prepared on April 22 of '93, is that the statement that the officer asked you to write out that you wrote out at that time?

A Well, he asked me to write a statement, that's what I ended up writing.

Q Okay.

I'm asking you ---

A (Interposing) That thing, that's a statement.

Q (Continuing) ... Exhibit Number 11?

A Whatever, um-hum.

Q Okay.

[Page 18]
And, the reason I want to ask you about that ---

A (Interposing) Yes, um-hum.

Q What was your emotional statement when you wrote out this statement?

A I was still distraught and dazed, you know.

Q You say, in the middle of the statement, in your writing that Burt, "...felt so hurt by this long standing relationship, that he felt she should not live."

Had he, in fact, talked to you about his relationship with Toni and feeling that she should not live?

A The only thing he ever talked about sometime, she was married and she had a husband that was mistreating her pretty bad and he would have to go sometime and get her from that home when she would call him. That's the biggest thing.

Q Okay.

Had he told you, before leaving the house on the twenty-second (22nd) that Toni shouldn't live?

A No, he didn't say that.

Q The point I want to make is, that if Burt hadn't said that, then why did you write that statement

[Page 19]
for the police later on that day?

A Well, when the Detective came in he wanted to talk to me about the case. I said, 'Well, I've talked to everybody about it.' Because I'd seen lots of people.

And he said, 'Well, I want you to give me a statement.'

I said, 'Well, I don't want to write a statement.' I said, 'I've talked to everybody.'

And he said, 'Well, I need a statement.' He said, 'I have to have a statement.'

He was walking behind me, because the way the house is laid out I can walk almost in a circle through the kitchen around the living room. And he kept following me. He said, --- and I turned around and I asked him, I says, 'Well, if I write a statement would you help Burt? Would you get Burt a doctor and medication, would you help him?'

He said, 'Oh, yeah, we'll help him.

And I said, 'Okay.' So I said, 'I would write this.' And I knew exactly what I had said to the police

earlier. I said, 'I would write this.' Hopefully that they would take him

[Page 20]
and look at this and see that he needed help and give him help.

Q But, why would you write something in that statement that wasn't true?

A Because --- the same way I magnified the telephone call to get them to move, because he assured me --- he talked very sweet and nice that he would --- that they would help Burt.

And the condition Burt was in, that's all I wanted for him was help, because when I took him down to the doctor they refused him two places, even after the social worker begged the doctor to bring him into the hospital and he refused him. He had no medication.

Q To your knowledge, when was the last time Burt got any medication before the day of the shooting?

A They gave him a few days worth when they discharged him from the hospital, which is customary and you are supposed to go back to your own doctor. So he had had none since then. And he was self-medicating with beer.

Q Thank you.

MR. MOGILL: I don't have any further questions for right now.

THE COURT: Any further redirect?

[Page 21]
MR. WALTON: Yes, sir, thank you.

REDIRECT EXAMINATION

BY MR. WALTON:

Q Mrs. Lancaster, in the written statement that you provided, just so we have time sequence down here.

A Yes.

Q You wrote this statement after your son had left that day; correct?

A Yeah, that night.

Q Okay.

You had written the statement after you had already talked to the Detroit Police Department, Officers Raby and Falk that came to your house: correct?

A Yeah.

Q Okay.

You had written a statement after you received a phone call from your son, later that evening; correct?

Where you had previously indicated that he was very distraught and crying; correct?

A Um-hum.

Q That's a 'yes'?

A Yes.

[Page 22]
Q You had also written a statement after you had learned, according to your testimony from Detective Reggie Phillips, that Toni King had been shot by your son?

A No, not Phillips. Phillips didn't tell me anything. Phillips was in the house all the time.

Q But you had previously testified that you had learned that Toni had been shot because Reggie Phillips had told you?

A Not Phillips, Raby.

Q No, you said Phillips. Detective Phillips, Detective Phillips.

A Phillips couldn't tell me anything. He was never in the field. It was Raby that was going back and forth. He and Detective Faulk were together.

Q Do you remember a previous question being asked of you; "Okay. And, at the time did you not tell Detective Phillips that Burt told you that he had shot Toni, and that --- and had a few bullets left for himself."

Your response; "No, he didn't say he shot Toni, he said he was going to kill himself. That he never said, 'I'm going to kill himself.'

A Well ---

[Page 23]
Q (Interposing) So you remember talking to Detective Phillips about this? After learning that Toni had been killed?

A No, not the way you said it there.

Q Okay.

Detective Phillips did come in to your house to talk to you; correct?

A Yes.

Q And, you had learned that Toni King had been shot; correct?

A I learned that earlier from Detective Raby.

Q Okay.

And, you wrote People's Exhibit 11 after you learned that Miss King had been shot; correct?

A Yes, it had to be in the evening.

Q Okay.

In your statement you had indicated that He felt that he had deceived --- 'Toni had deceived Burt.' Correct?

A In what statement?

Q Okay. I'm sorry.

Your written statement, did you not write that; "He felt that Toni had deceived ---"

Excuse me. "That Toni, the deceased, had lied and misled him."

[Page 24]
A Yes. I probably wrote that.

Q And, you had previously testified before Judge Howard, that Miss King was married; correct?

A Yes.

Q That she would not divorce her husband; correct?

A I don't remember saying that.

Q Okay.

She did not divorce her husband; correct?

A I don't know whether she did or not; I believe she was in the process of getting a divorce, that's all I knew.

Q That 'they', referring to Miss King and your son, had actually gone through the process of buying a house together; correct?

A Yes. They were --- they didn't buy it, they went to attempt --- you know, how you go to look at a house.

Q Well, you actually inspected the house; correct?

A Yes.

Q You thought the deal was going through?

A Yes. Well, I didn't know it was going through, but let's say that all of that happened, I did go to inspect that for him.

Q Well, when Mr. Soul questioned you last time

[Page 25]
Before Judge Howard, the question was: "How did you know they had bought a house together?"

And, you had responded, in the transcript; "That you had inspected it."

A He asked me to do a pre-inspection.

Q Okay. All right.

So, your understanding at the time was That the Defendant and Miss King were going to move into a house together; correct?

A They were supposed to get married, eventually.

Q Now, is it also true that Miss King had demonstrated or, according to your son, demonstrated some reluctance to leave her husband at this point?

A That could be possible; I don't know.

Q Okay.

And, this is a fact that upset your husband --- your son, he had dedicated his life at this point to Miss King; correct?

A How --- what do you mean when you say 'dedicated'?

Q Well, didn't he go through the process of decorating a house?

A No. The people were in that house.

Q Excuse me. Decorating an apartment that he was living in with Miss King at the time?

[Page 26]
A (No verbal response.)

Q He actually bought a larger apartment ---

A (Interposing) No.

Q (Continuing) ... so that Miss King's son could move in; correct?

A (No verbal response.)

Q In Northgate?

A No. They ---

Q (Interposing) Do you remember testifying ---

A (Interposing) They moved into an apartment, but he didn't do any decorating, they do the decorating.

Q Do you remember previously testifying before Judge Howard that; "Your son was going through the process of bankruptcy because he had gone through with the house and buying some nice things for Toni King for the house."?

A Well, he did go in bankruptcy.

Q Okay.

And, you had previously testified that he had gone through this process of bankruptcy because he was buying nice things for Miss King; correct?

A I imagine so; yes.

Q Okay.

[Page 27]

So, he had gone through the process; he had dedicated at least a large portion of his finances to Miss King; correct?

A I believe he took care of her nicely.

Q And that then, in turn, put him in some financial peril; correct?

I mean, he was going through bankruptcy as a result of this; correct?

A Yes, okay.

Q He had made a promise to marry Miss King; correct?

A I believe they were going to get married; nobody verified that.

Q He had also gone through the process of beginning to buy a house for himself and Miss King; correct?

A Yes, they were --- they were supposed to buy a house.

Q Okay.

But, yet, she wouldn't take that final step?

A I don't guess she could if she wasn't divorced.

Q Okay.

But, she wasn't willing to get that divorce, according to your son; correct?

A I don't know that. Now that, I don't know.

Q Okay.

[Page 28]
Now, in your statement, do you not indicate that; "Toni had lied and misled him."

A In my statement I wrote to the Detective you mean?

Q Yes.

A Yes, I wrote that.

Q What do you mean that, 'She had lied and misled him' ?

A Those are the things I wrote to magnify the help that he needed, because this Detective said they would give him help.

Q Okay.

So, you took the time to write out a statement that he had, --- in essence, you have now provided a motive for your son to kill this woman.

Was that your thinking?

MR. MOGILL: Objection.

THE WITNESS: No.

THE COURT: What is the objection.

THE WITNESS: No.

THE COURT: Sustained. Go ahead.

Q (By Mr. Walton, continuing) What did you mean then by 'lying and mislead"?

How did Toni King lie to your son?

A When I asked him, he said; "Write anything."

[Page 29]
I asked him, I said, 'What do you want me to write?"

He said; "Just write anything, I need a statement."

Q Okay.

Let's go with that then. So, when you wrote this statement you decided to lie to the police?

A I --- yes, I did.

Q Okay.

So, in order to get your son out of trouble, you were willing to lie to the authorities?

A No. That wasn't to get him out of trouble.

Q That was get him help?

A That was to get him help.

Q Okay.

So, in order to get your son help, you were willing to lie to the authorities?

A I didn't mind if they took him to jail and they treated him, it was just fine.

Q So, the answer to my question is, 'Yes, you would lie to the authorities, if you thought it was going to get him help?'

A Yes.

[Page 30]
Q Okay.

Now, in your statement you also indicate that Miss King and the Defendant had a long-standing relationship; correct?

A I don't know that. I don't know what you call long.

Q Well, that's what you wrote; correct?

A I don't know --- half of what I wrote.

MR. WALTON: May I approach, your Honor?

THE COURT: Yes, you may.

MR. WALTON: Thank you.

Q (By Mr. Walton, continuing) Ma'am. I am going to refer you to People's Exhibit Number 11, and ask you; does it not indicate: "He felt so hurt by this long-standing relationship."

A Fine.

Q Okay.

So, they had some type of long-standing relationship, according to the statement; correct?

A According to the statement that I manufactured; yes.

Q Okay.

So, you lied to the police about the length of the relationship?

[Page 31]
A Everything on there is a lie.

Q Okay.

So, your son never made a statement that he intended to kill himself?

A He did that all beforehand.

Q Well, that's in the statement; is that a lie, Ma'am?

A Well, you can take that part out; yes.

Q Okay.

So, when you wrote this statement, just so I understand and the Court understands, this is after

you learned all the underlying facts from the police, that Miss King has been shot; correct?

A Yes.

Q Your son had been with you in the house that day; correct?

A Earlier.

Q Yes.

A Um-hum.

Q Okay.

Then, while --- and him being in the house had caused you some emotional concern; correct?

A Not ---

Q (Interposing) I mean, not being in the house,

[Page 32]
but just his emotional state caused you some concern; correct?

A Yes.

Q His sudden leaving the house caused you even greater concern?

A Yes.

Q And when you learn of Miss King's death, that aggravates it even further; correct?

A Worse than aggravates.

Q Okay.

And then you write this statement?

A Yes.

Q All right.

Now, in the statement you also indicate that the Defendant had disconnected your phone; correct?

A I said, 'possibly'. I said, 'I didn't know.' I think that was the last thing.

Q Doesn't that say (indicating); 'I went next door to call the police because he had disconnected ...' something ... 'to the phone.' 'The line to the phone.'

A I didn't know whether he had or not. I left the house immediately.

Q Okay.

[Page 33]

When you came back to the house, though, your phone was, in fact, disconnected; correct?

A I don't know that.

Q Okay.

A I didn't pick up my phone or anything.

MR. WALTON: Thank you, Miss Lancaster. I have no further questions.

THE COURT: Anything further?

MR. MOGILL: No re-cross.

THE COURT: All right.

You may step down, Ma'am, watch your step.

THE WITNESS: Okay.

MR. MOGILL: May the witness be excused?

MR. WALTON: No objection.

THE COURT: Yeah.

Why don't you help her off the witness stand.

MR. WALTON: Oh. yes, your Honor, I am sorry.

Just push the door.

Watch your step.

THE COURT: Swear the witness.

THE CLERK: Please raise your right

* * *

[Page 59]
THE CLERK: All rise.

Oakland County Circuit Court is now in Session, the Honorable John J. McDonald now presiding.

You may be seated.

(Whereupon the matter was commenced at 11:05 a.m.)

* * *

Calling case number 9 3 1 2 7 6 3 2 -FC. The People versus Lancaster.

THE COURT: Ready?

MR. WALTON: Yes, Paul Walton, on behalf of the People, your Honor.

THE COURT: Okay.

MR. MOGILL: Okay.

If it please the Court, I believe the Prosecution rested on the record?

THE COURT: Yes.

And, the record should reflect I did have the opportunity to review both Exhibits, which is the Autopsy Protocol and eleven (11).

MR. MOGILL: Thank you, Judge.

THE COURT: Okay.

MR. MOGILL: If it please the Court, at this point I think it is the time for me to make

[Page 60]
my offer of proof, based on the procedural posture of the case.

As the Court may know, or I believe knows from prior litigation before --- pre-trial litigation, when this

case was first tried back in '94 one of the Defenses offered was the Defense of Diminished Capacity.

And, it --- in fact the notice of Defense of Diminished Capacity was filed by Mr. Henry, the attorney --- one of the two attorneys for Mr. Lancaster at the time. That ---

THE COURT: (Interposing) Who were the attorneys then?

MR. MOGILL: The attorneys at the original trial were Milton Henry and Myzel Soul.

THE COURT: Okay.

MR. MOGILL: And. Mr. Soul's name was mentioned as one of the attorneys.

THE COURT: Right. I didn't hear Henry's name being mentioned.

MR. MOGILL: And, anyway, the Notice of the Defense of Diminished Capacity was, in fact, filed on May 12th, 1994.

The case was tried with both the Sanity and Diminished Capacity Defenses. Obviously they

[Page 61]
were unsuccessful.

The appeal was eventually successful on a Habeas, and but for **People v Carpenter** and my unsuccessful motion to ask you to rule that Carpenter could not be applied retroactively, then it had been my intention to

defend the case by offering evidence of Diminished Capacity.

Since I cannot offer that evidence I believe it is appropriate to make my record that I present an offer of proof. Consistent with the Court's directive to Mr. Walton and me, at the end of yesterday's session, I have gone over my proposed offer with him so he knows what I am about to put on the record.

And, at this point then I would make an offer of proof that, if permitted to offer the defense of Diminished Capacity I would offer the following categories of evidence supplemented --- supported by appropriate documentation.

Category one, we have touched on a little bit, that Mr. Lancaster was born into a family with lengthy, serious mental health histories. His father and his uncle both had long histories of psychiatric problems. He has had two siblings who have committed suicide.

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The second category is Mr. Lancaster's early background. He was a special education student as a child for three years. He was tested at about age eleven (11), and found to have a composite IQ of eighty-four (84), which places him in the dull to average range of intellectual functioning.

The third category is the history of psychiatric problems beginning approximately at adolescence, suicidal lineation and attempts from about age sixteen (16).

Treatment by a number of different treaters, Dr. Michelle Reid, REID, who diagnosed Mr. Lancaster as having a major depressive disorder.

Dr. Hughes, bi-polar and blackouts; treated him with lithium. The treaters ---

THE COURT: (Interposing) Who was the doctor with the bi-polar? Doctor ---

MR. MOGILL: (Interposing) Dr. Hughes.

THE COURT: Hughes?

MR. MOGILL: Yes.

That there were treatments and hospitalizations going in a continuous line from the late eigh ies ('80s) into early 1993.

[Page 63]

Southwest Detroit Hospital, a diagnosis of major depressive disorder, January of '88. Sinai Hospital, major depression, bi-polar, suicidal, paranoid.

April of 1989 Riverview Hospital, bi-polar disorder, substance abuse.

June of '89 the same and adding closed head injury and suicidal. June of 1990.

Southwest Detroit Hospital, chronic depressive psychosis, July '90.

Southwest Detroit Hospital, major depression, attempted suicide July --- excuse me, September '90.

Riverview Hospital, bi-polar disorder, closed head injury, drug dependence, also September '90.

Riverview Hospital, bi-polar disorder, drug --- excuse me drug dependence, May of '91.

Psychiatric Center of Michigan Hospital, bi-polar disorder, depressed, alcohol dependence, brain injury, January of '93.

And, I would support this further with expert testimony from Dr. Michael Abramsky. Dr. Abramsky, by way of his credentials, holds a PhD from --- in psychology from the State University

[Page 64]
of New York in Buffalo; which he earned in 1973.

Having received his undergraduate degree at the old Montieth College of Wayne State University in 1965.

Fully licensed in Michigan since 1977. Board Certified in Clinical and Forensic Psychiatric --- excuse me Psychology.

Approximately twenty (20) publications and major presentation. Has lectured in law and psychiatry as an adjunct at Wayne State University on the use of psychiatric and psychological testing in legal cases.

A member of the American Bar Association ad hoc committee on mental illness and the death penalty, and he has been admitted as an expert witness virtually all over Michigan and in a number of different

federal districts. And had at least one case each in Canada and Florida.

That if he is permitted to testify Dr. Abramsky would testify that at the time of the offense here Mr. Lancaster was morbidly clinically depressed and that depression affected --- that clinical depression affected his mood, his ability to plan, his ability to think clearly. his ability to --- excuse me, try to anticipate consequences.

[Page 65]

That the history of special education is related to a particular type of brain damage that renders Mr. Lancaster more fragile than a normal person, more subject to psychiatric problems than a normal person.

That there was a similar history of depression prior to the incident. That his mental illness constitutes a major depression and compromised his ability to form the specific intent necessary to constitute First Degree Murder. That, in fact, here there was a dual diagnosis with substance abuse which aggravated the situation resulting in more impulsivity, less ability to reflect, less ability to anticipate consequences.

Decreased understanding impacted behavior on other persons and decreased self-control.

Again, as to each of these areas they --- these are summaries that would have been fleshed out with appropriate testimony and records were I permitted to offer a Defense of Diminished Capacity.

I also --- for the record, obviously, I would have anticipated that the Prosecution would

[Page 66]
respond to that testimony, and I would rebut that response. But, given the procedural posture I believe it's the Court's ruling that I may not present this testimony.

That being the case, the Defense rests.

MR. WALTON: Your Honor, because of the proof ---

I'm sorry, Counsel, are you done?

MR. MOGILL: Yeah.

MR. WALTON: Okay.

Because this is an offer of proof, obviously, I want the Court to know that we were in a position to rebut the claims. The Defendant was examined by an examiner, Gail Foley (phonetic), from the Forensic Center. The evaluation that was conducted at the time, because of the issue of Diminished Capacity was arguably still in play at that time.

The Defendant was still evaluated for the issue of Diminished Capacity. Even despite this the Forensic Center had indicated that Defendant was not suffering from --- or, Diminished Capacity did not prevent him from forming the requisite intent. That evidence was actually presented at the trial, which was

[Page 67]
objected by the trier of fact.

And, additionally, your Honor, if the Defendant proffered this evidence, I indicated before that it would not go uncontroverted. I would indicate that numerous

times. through the medical records that were reviewed on the previous --- to be reviewed on the previous occasions had indicated that the Defendant had had actually sought --- had checked into the hospital complaining of some mental disorder, but it was later learned that it was a substance abuse.

He was having a manic depressive episode associated with substance --- injection of Cocaine and then withdrawal of Cocaine. That was also flushed out by Dr. Gail Foley at the Forensic Center as well.

There was also some indication in Dr. Foley's report that the Defendant's manic depressive phases were on-set by whatever legal problems the Defendant was having at the time, whether they be in civil or criminal areas of --- of his life.

THE COURT: Is there anything to refute the bi-polar diagnosis or is that ---

MR. WALTON: (Interposing) Yes, there

[Page 68]
was evidence to refute the bi-polar diagnosis. It is very much in --- I mean ---

THE COURT: (Interposing) That's in dispute.

MR. MOGILL: It is in dispute. I --- I --- and there is no question that Mr. Walton would have evidence to present on his side as well as no question that we've got plenty of evidence in support of it, and were this a different trial we would be duking it out on that issue.

THE COURT: Okay.

I'm wondering, though, if --- just so the record is fully completed whether or not the --- the report from the Forensic Center should be made part of this record?

MR. WALTON: I certainly have no objection; your Honor.

THE COURT: Do you have any objection to that?

MR. MOGILL: As part of the offer of proof?

Well, I think, Judge that if ---

THE COURT: (Interposing) No, all I am getting at is this ---

MR. MOGILL: (Interposing) As you have

[Page 69]
allowed me to make an offer of proof, it is only fair to allow him to make an offer of proof as part of the same separate record.

THE COURT: So that this can be reviewed by some other court.

MR. MOGILL: No, right. Yeah. Again, I think that is reasonable.

THE COURT: Yeah.

MR. MOGILL: I think he can to the Court right now.

MR. WALTON: And, I just wanted to indicate ---

MR. MOGILL: (Interposing) It is Dr. Foley; is that it?

MR. WALTON: Yes.

MR. MOGILL: And it is the report on Criminal Responsibility she prepared prior to the first trial, is what I believe you are referring to; is that correct?

MR. WALTON: Yes.

MR. MOGILL: Yeah. I have no problem with that being part of the separate record. Okay.

THE COURT: Okay.

And you rest.

[Page 70]
MR. MOGILL: Pardon?

THE COURT: And you are resting?

MR. MOGILL: Yes.

THE COURT: Thank you.

MR. WALTON: One second, please.

MR. MOGILL: I'm sorry, if I can supplement, there are two points I almost forgot to make as part of my offer of proof.

THE COURT: Go ahead.

MR. MOGILL: One is that prior to the first trial, but after his arrest, while Mr. Lancaster was in the Oakland County Jail, there were two suicide attempts.

And, second, is that Mr. Lancaster has remained in the psychiatric field in all the intervening years while he has been in custody. And I want that added to the -- - to the offer of proof.

Thank you. Judge.

MR. WALTON: By way of closing argument, your Honor?

THE COURT: If you're ready to go.

MR. WALTON: Yes, Judge, the People are ready.

I want to make sure we are all on the

* * *

[Page 97]
{Mr. Mogill}

relevant evidence that leaves the Court reasonable doubt the Jury, the trier of fact, that is still fair game and **Carpenter** doesn't undermine that. And that Federal Constitutional Right that Mr. Lancaster has.

THE COURT: Well, what you are saying, basically, is the Prosecution has to prove each and every element beyond a reasonable doubt?

MR. MOGILL: Absolutely.

THE COURT: And any evidence that goes to --- to question one of those elements is fair game for the Court to consider.

MR. MOGILL: That's all I'm saying.

THE COURT: And I agree with them.

MR. MOGILL: Thank you, Judge.

THE COURT: And, so the Court has heard the evidence, and I am not going to go over all the evidence, it was a short trial, but basically There is no question ---

I might go over each element one at time, but there is no question that he caused the death of the decedent, and that she died as a result of the gunshot wounds. I don't think anybody is going to dispute that.

The second element is the Defendant

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intended to kill the deceased. I guess there is Really no reasonable doubt about that.

The third element is that the attempt to kill is premeditated and sought out beforehand. The Court has a little bit of a rough time on that, simply because of the evidence of the Defendant's past problems, emotional problems.

However, I go back to the **Carpenter** case, and the Carpenter case seems to be pretty conclusive on that particular issues. Even though he was distraught and had emotional problems, and I don't think there is any

question that he was diagnose of bi-polar is probably correct.

The issue, I guess, is did he think it out beforehand? And, the evidence seems to be pretty clear that he did. Now, was his thinking muddled? Yeah, I guess so. But, was his thinking affected by his emotional problems and his IQ and other things? Yeah, I think that is also true. But, if I were to only look at that, then I guess anyone who is retarded could probably never be found guilty of First Degree Murder because their thinking would be clouded so much by the mental retardation that they couldn't premeditate something because it --- their

[Page 99]
thinking wouldn't be correct.

And, so I do find, based on all the evidence in this case, a sad case in many ways, that there was sufficient evidence for the Court to find premeditation beyond a reasonable doubt, even though, as I said before, it may have been --- the thinking maybe affected, erroneously affected by his mental condition; or even his IQ.

And, then, finally, and in the fourth element was the killing, did he consider the pros and cons? Looking at all the evidence, here, again, did he consider them? Was he correct in his conclusions? Was his thinking affected, again, by his mental condition? By his emotional problems, by his psychological problems?

Probably yes, it was. But, nevertheless, I don't think it was to the extent that it would affect or act as a defense, I should say to that element.

And, finally that the killing was not justified, excused, or done under circumstance that would reduce it to a less crime.

So, based on all the evidence the Court does find that the People have established their burden of proof, proof beyond a reasonable doubt,

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and I do find the Defendant guilty of First Degree Premeditated Murder.

MR. WALTON: I know it is lesser issue, your Honor, but the Court also has to make a finding as to Count 2, and that is just a procedural matter.

THE COURT: Count 2 is?

MR. WALTON: Felony Firearm.

THE COURT: Well, I guess there is no question that he had a firearm in the commission.

MR. WALTON: And I appreciate that, your Honor, I am not trying --- I'm just trying to make sure we have the most complete record.

THE COURT: And, as I said before, this is a difficult case and Mrs. Lancaster, I guess I understand your position, and I am sure you are trying to help your son out, there is nothing wrong with that, but I have a problem --- a little bit of a problem with your testimony here in Court.

That's it. I can't respond to anything.

Thank you. Thank you.

All right.

MR. MOGILL: The sentencing date?

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
MAR - 2013
OFFICE OF THE CLERK

No. 12-547

In the Supreme Court of the United States

LINDA METRISH, WARDEN, PETITIONER

v.

BURT LANCASTER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the Michigan Supreme Court's recognition that a state statute had abolished the long-maligned diminished-capacity defense was an "unexpected and indefensible" change in a common-law doctrine of criminal law under this Court's retroactivity jurisprudence. See *Rogers* v. *Tennessee*, 532 U.S. 451 (2001).

2. Whether the Michigan Court of Appeals' rejection of Lancaster's due-process claim was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" so as to justify habeas relief. *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011).

PARTIES TO THE PROCEEDING

There are no parties to the present proceeding other than those listed in the caption. The Petitioner is Linda Metrish, Warden of a Michigan correctional facility. The Respondent is Burt Lancaster, an inmate. In the proceedings below, Patricia L. Caruso, Director of the Michigan Department of Corrections, was also a habeas respondent.

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OPINIONS BELOW

The court of appeals' opinion, Pet. App. 1a–35a, is reported at 683 F.3d 740. The district court's amended opinion, Pet. App. 37a–54a, is reported at 735 F. Supp. 2d 750. The Michigan Court of Appeals' opinion, Pet. App. 76a–78a, is not reported but is available at 2006 WL 3751420.

JURISDICTION

The court of appeals' judgment was entered on June 29, 2012. Pet. App. 36a. A petition for rehearing en banc was denied on August 27, 2012, App. 83a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Section 2254 of AEDPA, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq.*), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

At the time Lancaster committed murder in 1993, Mich. Comp. Laws § 768.21a defined legal insanity as follows:

> (1) A person is legally insane if, as a result of mental illness as defined in section 400a of Act No. 258 of the Public Acts of 1974, being section 330.1400a of the Michigan Compiled Laws, or as a result of mental retardation as defined in section 500(g) of Act No. 258 of the Public Acts of 1974, being section 330.1500 of the Michigan Compiled Laws, that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

At that same time, Mich. Comp. Laws § 330.1400a defined "mental illness" as follows:

> As used in this chapter, "mental illness" means a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.

INTRODUCTION

Burt Lancaster murdered his girlfriend in a parking lot in 1993. A jury rejected Lancaster's insanity and diminished-capacity defenses and convicted him of first-degree murder. But the conviction was vacated when a federal court found a *Batson* violation. Between Lancaster's first and second trials, the Michigan Supreme Court interpreted for the first time Michigan's 1975 statutory framework regarding mental incapacity. Because the statute was silent about diminished capacity, the court reasonably concluded that diminished capacity was not a valid defense to a crime. *People* v. *Carpenter*, 627 N.W.2d 276 (Mich. 2001). Accordingly, the state trial court forbade Lancaster from asserting the diminished-capacity defense at his second trial, and, following a bench trial, Lancaster was again convicted of murder.

The issue presented is whether the state trial court violated due process by barring Lancaster from asserting the diminished-capacity defense at his second trial. For two reasons, the answer is "no."

First, 18 years before Lancaster murdered his girlfriend, Michigan enacted a comprehensive law to determine when a person's mental incapacity excuses criminal responsibility. The statute does not allude to any mental condition other than insanity. Anyone reading the law could have concluded that diminished-capacity was not an enumerated affirmative defense. So the Michigan Supreme Court's *Carpenter* decision did not change the law at all; it merely recognized the law the Legislature had already enacted nearly two decades before Lancaster's criminal act.

And even if *Carpenter* is construed incorrectly as changing Michigan law, such change was readily foreseeable and did not deny Lancaster fair warning that he was barred from claiming diminished capacity if he killed someone. Thus, *Carpenter*'s application here does not violate due process. *Rogers* v. *Tennessee*, 532 U.S. 451, 462 (2001); *id.* at 470 (Scalia, J., dissenting).

Second, in analyzing Lancaster's claim, the Michigan state courts are entitled to two layers of deference. To begin, federal courts should respect the Michigan Supreme Court's pronouncement that it was the 1975 statute that abolished the diminished-capacity defense. *Howlett* v. *Rose*, 496 U.S. 356, 366 (1990); *Rogers*, 532 U.S. at 469 (Scalia, J., dissenting). Even in the absence of clear statutory language, until a "state's highest court has spoken on a particular point of state law, the law of the state necessarily must be regarded as unsettled." *Niederstadt* v. *Nixon*, 505 F.3d 832, 837 (8th Cir. 2007) (en banc) (quotation omitted). And a "ruling on an unsettled issue of state law will rarely if ever be unexpected and indefensible." *Id.*

In addition, the Michigan Court of Appeals held that *Carpenter* did not change Michigan law and was foreseeable. Pet. App. 77a–78a. Applying AEDPA deference, that holding was not an error "so well understood and comprehended in existing law" that it was "beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011). Indeed, of the 15 state and federal judges to whom this case has been presented, only the two in the Sixth Circuit majority have said there was constitutional error. The court of appeals should be reversed.

STATEMENT OF THE CASE

A. Toni King's murder

On April 22, 1993, Burt Lancaster spent several hours talking with his mother. Lancaster told her that his girlfriend, Toni King, had lied to him, hurt him, and she needed to die. J.A. 106–107, 143–44, 148–49, 151. Lancaster was a former Detroit police officer, and he asked his mother if he could have a gun. J.A. 107. She refused to give him one, so Lancaster broke into his mother's hallway closet, stole a gun, and fled. *Id.* Lancaster disabled his mother's phone, forcing her to run to the neighbor's home to call the police. *Id.*

Meanwhile, King and a co-worker, Julie Garner, departed work for lunch. J.A. 17. King drove the two of them to a bank, J.A. 17–18, where Garner noticed that Lancaster was following them in his black car. J.A. 18–19. At the bank, Lancaster got out of his car and talked with King while Garner went inside to cash a check. J.A. 19–24. Lancaster appeared "pretty calm." J.A. 23.

King rejoined Garner, and the two of them left the bank and drove to a Coney Island for lunch. J.A. 25. Lancaster again tailed them. J.A. 26. After the women parked at the Coney Island, Lancaster pulled into the parking lot behind them and asked to speak with King. J.A. 29. Lancaster still appeared calm. *Id.*

Garner left Lancaster and King to talk together privately and turned to enter the restaurant. J.A. 29–30. Just then, Garner heard King exclaim either "Burt" or "what." J.A. 33. Garner spun, heard something that sounded like "firecrackers," and saw King crumple to the ground. J.A. 34. A gun protruded from the driver's side of Lancaster's black car. J.A. 34, 36. Lancaster was the car's only occupant.

King died from injuries caused by the shooting.

B. Lancaster's 1994 trial

At his first trial, Lancaster asserted the defenses of insanity and diminished capacity. The jury rejected both defenses and found Lancaster guilty as charged.

After failing to obtain relief on his direct appeal in state court, Lancaster filed a petition for habeas relief in federal district court. The district court granted Lancaster habeas relief, concluding that there had been an error during jury selection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The Sixth Circuit affirmed. *Lancaster* v. *Adams*, 324 F.3d 423 (6th Cir. 2003).

C. Lancaster's 2005 trial

The State retried Lancaster in 2005. But before trial, the court ruled that Lancaster could not present a diminished-capacity defense because the Michigan Supreme Court's intervening decision in *Carpenter* confirmed that the defense was not available in Michigan. J.A. 11. Lancaster made an offer of proof on his proposed "diminished capacity" defense after he failed to win an interlocutory appeal. J.A. 155–61, 164–

65. In response, the prosecutor made a counter-offer of proof that included Dr. Gail Farley's report from the forensic center that challenged Lancaster's claim of diminished capacity. J.A. 161–64. Following a bench trial, the state trial court again found Lancaster guilty of first-degree murder. J.A. 166–68.

On direct appeal, the Michigan Court of Appeals affirmed the conviction and held that the trial court did not violate Lancaster's due-process rights. The Michigan Court of Appeals concluded that the Michigan Supreme Court's *Carpenter* decision did not change state law and in any event was not unforeseeable. Pet. App. 77a–78a.

D. Federal habeas corpus proceedings

The district court denied Lancaster habeas relief because it also understood *Carpenter* to be a foreseeable application of Michigan law. The Michigan Supreme Court "never specifically authorized [the defense's] use in the Michigan courts," the defense had "never been codified by the legislature," and the theory "never enjoyed a solid foothold in Michigan's law," having "never served as a ground of decision in any murder case." Pet. App. 49a–51a. Accordingly, *Carpenter* was not "unexpected and indefensible" such as to result in a due-process violation. Pet. App. 51a. "The Supreme Court of [Michigan] is entitled to correct a lower court's mistaken reading of a state statute without running afoul of the Due Process Clause." Pet. App. 51a (quoting *Hagan* v. *Caspari*, 50 F.3d 542, 547 (8th Cir. 1995)).

The Sixth Circuit panel majority reversed, determining that the Michigan Court of Appeals unreasonably applied this Court's decisions in *Rogers* and *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). Pet. App. 26a–27a. The majority said that the Michigan Court of Appeals disregarded its own prior cases suggesting that a diminished-capacity defense might be available in Michigan, as well as the Michigan court rule that says published Michigan Court of Appeals opinions are binding on lower courts until reversed by the Michigan Supreme Court. Pet. App. 27a. The majority also relied on the fact that Michigan's standard jury instructions referenced the defense. Pet. App. 18a–19a.

Sixth Circuit Chief Judge Batchelder dissented, concluding that the Michigan Court of Appeals' decision was reasonable under *Rogers* and *Bouie* because the diminished-capacity defense was not well-established in Michigan, and the Michigan Supreme Court's decision in *Carpenter* was foreseeable. Pet. App. 29a–35a. The defense "never served as the basis for any court's decision," and even before *Carpenter*, "neither the Michigan legislature nor the Michigan courts gave diminished capacity standing as a separate defense." Pet. App. 32a. "Surely the legislature's choice not to codify diminished capacity is more significant than the state bar association's choice to include it in its publication of standard jury instructions." *Id.*

Since the Michigan Court of Appeals' conclusion was "consistent with *Rogers* and *Bouie*," the decision "was not 'so lacking in justification' as to entitle Lancaster to habeas relief." Pet. App. 31a (quoting *Harrington*, 131 S. Ct. at 786–87).

SUMMARY OF ARGUMENT

The Sixth Circuit's opinion granting habeas relief is flawed in two fundamental ways.

1. The Sixth Circuit misapplied this Court's decisions in *Rogers* v. *Tennessee*, 532 U.S. 451 (2001), and *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). Under those precedents, retroactive application of a state-court decision abolishing an affirmative defense violates federal due process *only* if the decision unexpectedly and indefensibly abrogated a consistent line of decisions recognizing the defense as well as adopted an interpretation that the governing statute's plain language does not support. The paramount questions under this standard focus on notice, foreseeability, and fair warning. *Rogers*, 532 U.S. at 462; *Bouie*, 378 U.S. at 458–59.

The diminished-capacity defense was not well-established in Michigan law before Lancaster murdered Toni King. Quite the opposite, Michigan abolished the defense in 1975, some 18 years before King's murder. It is true that intervening Michigan decisions assumed the diminished-capacity defense's viability without actually deciding that issue. But no Michigan appellate case ever affirmatively stated that this defense existed as a matter of Michigan law, and the Michigan Supreme Court in *Carpenter* did not view itself as changing Michigan law at all. That reasonable reading of the Michigan legal landscape is entitled to respect. *Howlett* v. *Rose*, 496 U.S. 356, 366 (1990).

At a bare minimum, the Michigan Supreme Court's interpretation of the 1975 statute and rejection of the diminished-capacity defense in *Carpenter* was expected and defensible. Nationwide, the defense had lost credibility, and many state courts and legislatures had repudiated the doctrine. As this Court noted in *Rogers*, common-law courts "frequently look to the decisions of other jurisdictions in determining whether to alter or modify a common law rule in light of changed circumstances, increased knowledge, and general logic and experience." 532 U.S. at 464. Given this trend in the law, it was entirely foreseeable that the Michigan Supreme Court would refuse to recognize the diminished-capacity defense when finally confronted squarely with the question of the doctrine's existence.

2. Under § 2254(d)(1)(D) of the Antiterrorism and Effective Death Penalty Act, a federal court may vacate a state conviction only if the conviction was "contrary to, or involved an unreasonable application of" this Court's "clearly established" law. 28 U.S.C. § 2254(d)(1)(D). Such a decision must constitute an error so "well understood and comprehended in existing law" that it was "beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011).

The state courts committed no such error here. To the contrary, the Michigan Court of Appeals result is entirely consistent with the reasoning of this Court's decisions in *Rogers* and *Bouie*. It cannot be said that the result is "beyond any possibility for fairminded disagreement."

Michigan respectfully asks this Court to reverse the court of appeals.

ARGUMENT

I. The Michigan state courts did not deny Lancaster due process by declining to allow him to present a diminished-capacity defense at his second trial.

A. Retroactive application of a state-law decision does not violate due process if the decision was expected and defensible.

In *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), this Court held that the South Carolina Supreme Court deprived two African-American college students their right to due process when a 1961 statutory construction was used to support convictions based on a sit-in that took place in 1960. The students sat down at an Eckerd's drug store lunch counter. *Id.* at 348. The restaurant department was reserved only for whites, but there were no signs or notices posted indicating that African-Americans would not be served. *Id.* An employee put up a "no trespassing" sign, and the manager twice asked the students to leave; they refused, and the manager phoned the police. *Id.* A police officer then asked the students to leave. When they again refused, the students were arrested and charged with breach of the peace and criminal trespass. *Id.* at 348–49.

The *Bouie* defendants claimed that they were denied due process of law because the statute failed to afford fair warning that the conduct for which they had been convicted had been made a crime. *Id.* at 349. This Court agreed, holding that the South Carolina Supreme Court violated due process by applying a

brand new statutory construction (the statute covered not only the act of *entering* the premises of another after receiving notice not to enter, but also the act of *remaining* on the premises after receiving notice to leave) to conduct that took place one and a half years before the decision. *Id.* at 350. There was no fair warning that the defendants' conduct was prohibited at the time they engaged in it. *Id.* at 350–51.

Significantly, the legal rule the South Carolina Supreme Court announced in *Bouie* conflicted directly with the relevant statutory language. Whereas the statute required notice "prohibiting such *entry*," *id.* at 349 n.1 (emphasis added), the South Carolina Supreme Court held the *Bouie* defendants criminally responsible for *remaining* on premises after being asked to leave. This was an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 352. A judicial construction of a criminal statute must not be given retroactive effect if it is "unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue." *Id.* at 354 (internal quotations omitted).

This Court applied the *Bouie* analysis in *Rogers*. There, the Tennessee Supreme Court abolished the common-law rule that the death of a victim within a year and a day after being assaulted is a prerequisite to a homicide prosecution. The state court applied that abolition when it upheld a murder conviction where, because of a coma and resulting complications, the victim died 15 months after the assault. On direct review, this Court upheld the conviction, holding that the Tennessee Supreme Court's retroactive abolition of the "year and a day" rule did not violate due process.

First, the Court reasoned that abolition of the "year and a day" rule was not unexpected or indefensible because it was based on an "outdated relic of the common law." *Rogers*, 532 U.S. at 462. Second, "the fact that a vast number of [other] jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed." *Id.* at 463–64. Because the state court's abolition of the year-and-a-day rule was foreseeable, the Tennessee Supreme Court did not violate Rogers' due-process rights.

In sum, leaving aside the deference owed on habeas review, the federal courts' role in this dispute is to determine whether the Michigan Supreme Court's decision in *Carpenter* was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers*, 532 U.S. at 461 (quoting *Bouie*, 378 U.S. at 354).

As explained below, *Carpenter* was not unexpected and indefensible. Indeed, *Carpenter* is the exact opposite of the situation presented in *Bouie*. Whereas the Tennessee Supreme Court effected an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language," *Bouie*, 378 at 352, the Michigan Supreme Court properly applied narrow and precise statutory language that had existed for many years before Lancaster committed murder. When a state court follows the plain language of a state statute, it is not *changing* state law, it is *applying* it.

B. The Michigan Supreme Court's *Carpenter* decision did not change Michigan law but merely recognized clear language of a pre-existing statute.

1. *Carpenter* correctly rejected the diminished-capacity defense based on a plain reading of the Michigan Legislature's 1975 enactment.

A panel of the Michigan Court of Appeals first suggested the possibility of a diminished-capacity defense in 1973. *People* v. *Lynch*, 208 N.W.2d 656 (Mich. App. 1973). But only two years later, the Michigan Legislature adopted Public Act 180, a comprehensive statutory framework addressing mental incapacity as a defense to criminal acts. Significantly, the statute addresses persons who are mentally ill but not legally insane, authorizing them to be found "guilty but mentally ill." Mich. Comp. Laws § 768.36(3). But the statute said nothing about diminished capacity as an available defense:

> A person is legally insane if, as a result of mental illness as defined in section 400a of Act No. 258 of the Public Acts of 1974, being section 330.1400a of the Michigan Compiled Laws, or as a result of mental retardation as defined in section 500(g) of Act No. 258 of the Public Acts of 1974, being section 330.1500 of the Michigan Compiled Laws, that person *lacks substantial capacity* either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. [Mich. Comp. Laws §768.21a(1) (emphasis added).]

In enacting this statutory framework, the Michigan Legislature "conclusively determined when mental incapacity can serve as a basis for relieving one from criminal responsibility." *Carpenter*, 627 N.W.2d at 283. In essence, it is an "all or nothing insanity defense." *Id.* And by expressly providing for the mentally ill yet not legally insane, "the Legislature has demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." *Id.* In other words, the Legislature left no room in Michigan law for the diminished-capacity defense that *Lynch* had suggested.

Most important, the Michigan Supreme Court did not view itself as changing Michigan law. The court noted that "[s]ince its inception in the United States, the diminished capacity defense has been the subject of much debate." *Id.* at 282. But the court said it "need not join the affray." *Id.* That is because the Michigan "Legislature, by enacting the comprehensive statutory framework . . ., has *already* conclusively determined when mental incapacity can serve as a basis for relieving one from criminal responsibility." *Id.* (emphasis added). In other words, the court did not believe it was reversing a Michigan common law precedent. The court viewed itself as "*declin[ing] to adopt* an alternative defense to legal insanity 'that could swallow up the insanity defense and its attendant commitment provisions." *Id.* at 284 (emphasis added, quotation omitted). The "insanity defense as established by the Legislature is the *sole* standard for determining criminal responsibility as it relates to mental illness or retardation." *Id.* at 285 (emphasis added).

So the decision did not change Michigan law; it merely recognized the plain language of the governing statute. And as the first Michigan Supreme Court decision interpreting the statute, the Michigan Supreme Court's reasonable reading is binding on this Court. *Rogers*, 532 U.S. at 469 (Scalia, J. dissenting).

The Sixth Circuit panel majority viewed Michigan precedent differently. According to the majority, the Michigan Court of Appeals continued to recognize diminished capacity in *People* v. *Mangiapane*, 271 N.W.2d 240 (Mich. Ct. App. 1978), and its progeny. Pet. App. 10a–11a. As a threshold matter, such precedent is irrelevant given the plain import of the 1975 statute. Moreover, even in the absence of clear statutory language, until a "state's highest court has spoken on a particular point of state law, the law of the state necessarily must be regarded as unsettled." *Niederstadt*, 505 F.3d at 837 (quotation omitted).[1] And a "ruling on an unsettled issue of state law will rarely if ever be unexpected and indefensible." *Id.*

Equally important, the Sixth Circuit panel majority misinterpreted Michigan law. As the Michigan Supreme Court explained in *Carpenter*, the Michigan Court of Appeals decision in *Mangiapane* involved a defendant who did not raise the diminished-capacity defense at trial or provide the prosecution

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[1] This is consistent with how federal courts undertake a traditional *Erie* analysis. While state supreme court decisions are binding, in the absence of a state supreme court decision, the federal court must *predict* how the state supreme court would rule, taking into account all relevant data including decisions of the state intermediate appellate courts. *Gruber* v. *Owens-Illinois Inc.*, 899 F.2d 1366, 1369–70 (3d Cir. 1990).

notice, as the mental-capacity statute required. *Carpenter*, 627 N.W.2d at 282. Assuming (but not deciding) that such a defense even existed, the Michigan Court of Appeals simply said that a defendant asserting the defense "had to fully comply" with the statutory notice provisions. *Id.* (citing *Mangiapane*).

Other Michigan Court of Appeals cases that the panel majority cited also assumed the doctrine's existence without deciding that point. Pet. App. 11a. So did a number of Michigan Supreme Court cases. *People* v. *Lloyd*, 590 N.W.2d 738, 745 (Mich. 1999) (defense counsel's presentation of merged defense of no premeditation and diminished capacity did not constitute ineffective assistance); *People* v. *Pickens*, 521 N.W.2d 797, 812 (Mich. 1994) (defense counsel's decision to pursue insanity defense but not diminished-capacity defense was not ineffective assistance); *People* v. *Griffin*, 444 N.W.2d 139, 140 (Mich. 1989) (three-paragraph summary order remanding so trial court could consider whether counsel was ineffective for failing to explore defenses of diminished capacity and insanity); *People* v. *Fernandez*, 398 N.W.2d 311, 320 (Mich. 1986) (declining to address diminished capacity vis-à-vis voluntary intoxication as the question was not presented); *People* v. *Langworthy*, 331 N.W.2d 171, 178 (Mich. 1982) (declining to adopt California's diminished-capacity, voluntary-intoxication defense due to it being significantly undermined by California statute and case law); *People* v. *Burton*, 240 N.W.2d 239, 241 (Mich. 1976) (trial judge need not advise a defendant pleading guilty of "potential" defenses such as provocation and diminished capacity).

But under Michigan law, a judicial opinion's mere *assumption* of a point is not considered to have been decided. *In re Apportionment of State Legislature—1982*, 321 N.W.2d 565, 571 (Mich. 1982); *Allen* v. *Duffy*, 4 N.W. 427, 434 (Mich. 1880). And as early as 1985—eight years *before* Lancaster murdered King—the Michigan Supreme Court expressed its disapproval of a diminished-capacity defense. *People* v. *Ramsey*, 375 N.W.2d 297, 304 (Mich. 1985) ("A finding of mental illness, even when defined as a substantial disorder of thought or mood, does not inexorably lead to the conclusion that the defendant did not entertain the requisite malice aforethought for murder."). In fact, prior to *Carpenter*, no Michigan appellate case ever affirmatively stated that the defense existed as a matter of Michigan law. Pet. App. 51a. As the district court below recognized, it was not until *Carpenter* that the Michigan Supreme Court "addressed the question[ ] which it had left open." Pet. App. 51a.

The Sixth Circuit panel majority also misinterpreted Michigan law in other ways. For example, it is of no moment that published Michigan Court of Appeals decisions are binding on Michigan trial courts. Pet. App. 9a–12a. The Michigan Supreme Court has recognized that principle yet nonetheless held that such "law" cannot trump statutory language that, as here, is "unambiguous and clear." *People* v. *Doyle*, 545 N.W.2d 627, 635 (Mich. 1996).

Nor is it relevant that some Michigan standard jury instructions included the diminished-capacity defense. Pet. App. 18a–19a. The panel majority below recognized that the instructions are authorized by the state bar association and are "not officially sanctioned

by the Michigan Supreme Court." Pet. App. 18a. And as Chief Judge Batchelder correctly observed: "Surely the legislature's choice not to codify diminished capacity is more significant than the state bar association's choice to include it in its publication of standard jury instructions." Pet. App. 32a.

This legal history makes this case much easier than the Tennessee Supreme Court's abolishment of the so-called year-and-a-day rule at issue in *Rogers*. Unlike the year-and-a-day rule, the diminished-capacity defense had been superseded not by a common law decision, but by a comprehensive mental-illness *statute* that left no room for the defense and pre-dated Lancaster's crime by nearly two decades.[2]

"The interpretation and exposition of state law is the prerogative of the state's highest court." *Hagan*, 50 F.3d at 547. Thus, when the Michigan Court of Appeals issues a line of cases that assumes (without definitively deciding) that a common-law defense is available, the "Supreme Court of [Michigan] is entitled to correct a lower court's mistaken reading of a state statute without running afoul of the Due Process Clause." *Id.* *Carpenter* therefore did not effect a change in Michigan law.

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[2] The most significant source for interpreting a state statute is, of course, the provision's plain language. *State* v. *Redmond*, 262, 631 N.W.2d 501, 508–509 (Neb. 2001) ("Although [*State* v.] *Burlison*[,] 583 N.W.2d 31 (Neb. 1998)] overruled a line of cases, the prior cases were not without obvious disagreement. Further, this court's interpretation of [the statute] before *Burlison* was in direct contradiction to the plain meaning of the statute.").

2. The federal courts should be hesitant before castigating a state's highest court for misreading its own state law and precedent.

This Court conducts limited, highly deferential review of state-court interpretations of state law that a party challenges as violating federal rights. Indeed, state-law questions are "conclusively settled by the decisions of the state court save only as this Court, in the performance of its duty to safeguard an asserted constitutional right, may inquire whether the decision of the state question rests upon a fair or substantial basis." *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 654 (1942) (citation omitted). This Court will reject a state-court interpretation of a state-law issue only if the state court's decision was "without any fair or substantial support." *Howlett*, 496 U.S. at 366; *New York Times* v. *Sullivan*, 376 U.S. 254, 265 n.4 (1964); *Wolfe* v. *North Carolina*, 364 U.S. 177, 185–86 (1960); *Ward* v. *Love County Bd. of Comm'rs*, 253 U.S. 17, 22 (1920). In other words, if the state-court ruling "has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court." *Demorest* v. *City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944) (quotation omitted).

There are good reasons why federal courts should show more caution in reviewing state interpretations of state law than did the Sixth Circuit panel majority. To begin, state courts are more familiar with their own law and have a significant advantage relative to federal courts. More significant, it is difficult to discern

a common-law rule from intermediate state court decisions. Those decisions' meaning and significance is often subject to disagreement, especially when assessed by someone who is not a regular participant in the state judicial system. Such considerations should dissuade the federal courts from correcting allegedly erroneous interpretations of state law. Otherwise, "every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question." *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982) (citation omitted).

These considerations are even stronger in the specific context presented here. As the Eighth Circuit has explained, it is doubtful "whether a state supreme court's overruling of an intermediate appellate court decision *ever* can constitute a change in state law for due process purposes." *Hagan*, 50 F.3d at 547 (emphasis added). In the absence of a clear statute, "until the state's highest court has spoken on a particular point of state law, the law of the state necessarily must be regarded as unsettled." *Id.*

Thus, the "reasonable reading of state law by the State's highest court is binding upon [this Court]." *Rogers*, 532 U.S. at 469 (Scalia, J., dissenting). Cf. *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Protection*, 130 S. Ct. 2592, 2612 (2010) (Scalia, J., plurality opinion) (deferring to state-court precedent even though the "result under Florida law may seem counter-intuitive"). The Sixth Circuit erred in second-guessing the Michigan Supreme Court's (and Michigan Court of Appeals') interpretation of Michigan law.

C. The Michigan Supreme Court's *Carpenter* decision was expected and defensible.

As this Court explained in *Rogers*, *Bouie*'s due-process restriction on judicial interpretation of criminal statutes is limited to those interpretations "that are 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Rogers*, 532 U.S. at 461 (quoting *Bouie*, 378 U.S. at 354). This Court described the touchstones of the due-process analysis as "notice, foreseeability, and, in particular, the right to fair warning." 532 U.S. at 459 (citing *Bouie*, 378 U.S. at 351, 352, 354–55). Accordingly, while due process "does not require a person to apprise himself of the common law of all 50 States in order to guarantee that his actions will not subject him to punishment in light of a developing trend in the law," the "fact that a vast number of jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible." *Id.* at 464.

Here, wholly aside from the plain import of Michigan's 1975 mental-illness statute, the nationwide trend regarding the diminished-capacity defense foreshadowed *Carpenter*. Thus, *Carpenter* was both foreseeable and defensible.

The diminished-capacity defense has a checkered history. In 1949, California became the first state to acknowledge the defense. *People* v. *Wells*, 202 P.2d 53 (Cal. 1949). Other states began to follow suit. But the defense began losing its legitimacy after a California jury used it to convict a defendant of a reduced charge of manslaughter (rather than murder) for the killing of

two individuals in San Francisco. The defendant in that case argued that a chemical imbalance caused by consuming too much "junk food" (including most famously "twinkies") exacerbated his pre-existing mental difficulties. *People* v. *White*, 172 Cal. Rptr. 612 (Cal. Ct. App. 1981). The California Legislature abolished the defense in response to public outcry. *In re Christian S.*, 872 P.2d 574, 575 (Cal. 1994).

Consequently, the "twinkie" defense (diminished capacity) had been receding in state jurisprudence long before Lancaster's trials. Some state legislatures wrote the defense out of their state laws, while in other jurisdictions, the state courts held that their case law did not support such a defense. Pet. App. 33a, n.1 (Batchelder, C.J., dissenting) (citing Cal. Penal Code § 25(a)); *Mincey* v. *Head*, 206 F.3d 1106, 1139 (11th Cir. 2000); *Barnett* v. *Alabama*, 540 So. 2d 810, 812 (Ala. Crim. App. 1988); *Arizona* v. *Laffoon*, 610 P.2d 1045, 1047 (Ariz. 1980); *O'Brien* v. *United States*, 962 A.2d 282, 300–01 (D.C. 2008); *Hodges* v. *Florida*, 885 So. 2d 338, 352 n.8 (Fla. 2003); *Hawaii* v. *Klafta*, 831 P.2d 512 (Haw. 1992); *Cardine* v. *Indiana*, 475 N.E.2d 696, 698 (Ind. 1985); *Iowa* v. *Plowman*, 386 N.W.2d 546, 548 (Iowa Ct. App. 1986); *Kansas* v. *Pennington*, 132 P.3d 902, 908 (Kan. 2006); *Louisiana* v. *Thompson*, 665 So. 2d 643, 647 (La. Ct. App. 1995); *Maryland* v. *Greco*, 24 A.3d 135, 144 (Md. Ct. Spec. App. 2011); *Massachusetts* v. *Finstein*, 687 N.E.2d 638, 640 (Mass. 1997); *Cuypers* v. *Minnesota*, 711 N.W.2d 100, 105 (Minn. 2006); *Stevens* v. *Mississippi*, 806 So. 2d 1031, 1051 (Miss. 2001); *North Carolina* v. *Adams*, 354 S.E.2d 338, 343 (N.C. Ct. App. 1987); *Ohio* v. *Wilcox*, 436 N.E.2d 523, 533 (Ohio 1981); *South Carolina* v. *Santiago*, 634 S.E.2d 23, 28 (S.C. Ct. App. 2006);

Tennessee v. *Gosse*, 982 S.W.2d 349, 353 (Tenn. Crim. App. 1997); *Davis* v. *Texas*, 313 S.W.3d 317, 328 (Tex. Crim. App. 2010); *Keats* v. *Wyoming*, 115 P.3d 1110, 1119 (Wyo. 2005)).

As this Court noted in *Rogers*, common-law courts "frequently look to the decisions of other jurisdictions in determining whether to alter or modify a common law rule in light of changed circumstances, increased knowledge, and general logic and experience." 532 U.S. at 464. Like the Tennessee Supreme Court's decision in *Rogers*, there was nothing about the Michigan Supreme Court's *Carpenter* decision that was "unexpected and indefensible," *id.* at 466, even if one ignores the plain language of the 1975 mental-illness statute.

It is also difficult to discern how Lancaster can argue that he lacked "fair warning" of the possibility that he might not be able to assert a diminished-capacity defense if he killed someone. *Rogers*, 532 U.S. at 459; *id.* at 470 (Scalia, J. dissenting); *Stogner* v. *California*, 539 U.S. 607, 650 (2003) (Kennedy, J., dissenting) ("We should consider whether it is warranted to presume that criminals keep calendars so they can mark the day to discard their records or to pace a gloating phone call to the victim. . . . The reliance . . . does not exist as part of our traditions or social understanding."). Such an argument assumes that Lancaster relied on the defense's existence when he murdered Toni King. And as the Third and Seventh Circuits have reasoned, "it would border on the absurd" to argue that a person would refrain from committing crimes or conduct his trial differently if he had known that a mental-capacity defense would no longer be

available to him. *Pannapula* v. *Ashcroft*, 373 F.3d 480, 495–96 n.14 (3d Cir. 2004) (quoting *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)). Objectively, a person cannot assert that he had the mental ability to appreciate the availability of a defense while simultaneously arguing that he lacked the mental capacity to form the intent required to support a murder conviction.

Indeed, this paradox is categorically true of all defendants seeking to avoid criminal responsibility by the application of a mental-capacity defense. The very nature of the defense (lack of mental capacity) precludes such reliance. If Lancaster is truthful when he asserts that he lacked the capacity to form the intent for murder, then it is equally true that Lancaster could not have relied on the diminished-capacity defense as the way to avoid being convicted of first-degree murder.

II. The Michigan Court of Appeals' decision rejecting Lancaster's due-process claim was objectively reasonable under AEDPA.

The state trial court's decision preventing Lancaster from asserting a diminished-capacity defense at his retrial is consistent with this Court's decisions in *Bouie* and *Rogers*. But the issue before the Sixth Circuit on federal habeas review was even more limited: whether, through the lens of AEDPA, the Michigan Court of Appeals' rejection of Lancaster's due-process claim was an objectively unreasonable application of clearly established federal law.

AEDPA authorizes a federal court to issue a writ of habeas corpus only if the state-court decision on a federal issue "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or it amounted to "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). Under AEDPA's standard of review, mere error by the state court does not justify the issuance of the writ; rather, the state court's application of federal law must have been objectively unreasonable. *Wiggins* v. *Smith*, 539 U.S. 510, 520–21 (2003).

An unreasonable application of federal law is different from an incorrect application of federal law. In *Harrington*, this Court reiterated that AEDPA requires federal habeas courts to review state-court decisions with "deference and latitude," and "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." 131 S. Ct. at 786 (quoting *Yarborough* v. *Alvarado*, 541 U.S. 652, 661 (2004)). AEDPA thus imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be "given the benefit of the doubt." *Renico* v. *Lett*, 130 S. Ct. 1855, 1862 (2010) (citing *Woodford* v. *Viscotti*, 537 U.S. 19, 24 (2002)).

The Michigan Court of Appeals rejected Lancaster's due-process claim because it reasonably concluded that *Carpenter* did not represent a change in state law. That is true as a matter of Michigan law. *People* v. *Doyle*, 545 N.W.2d 627, 634–35 (Mich. 1996)

(a Michigan Supreme Court decision that interprets an unambiguous statute for the first time does not change the law even if it reverses a contrary Michigan Court of Appeals decision). Accord Part I.B., *supra*.

The Michigan Court of Appeals' holding was also reasonable for a second reason. Based on *Rogers*'s analysis, any purported change in Michigan law was not "unexpected and indefensible." See Part I.C, *supra*.

Moreover, it cannot be said that a state-court decision was so lacking in justification and "beyond any possibility for fairminded disagreement" in a case where the trial court judge adjudicated the issue, a three-judge panel of a state intermediate appeals court affirmed, seven state supreme court justices saw no error sufficient to warrant further review, a federal district judge declined to set aside the result under habeas review, and a chief judge of a federal circuit agreed with the district court. Indeed, of the 15 state and federal judges who have been presented with this case, only two judges—the members of the Sixth Circuit panel majority—have issued an opinion concluding that there was a constitutional violation.

In sum, the Michigan Court of Appeals' decision rejecting Lancaster's due-process claim was not an objectively unreasonable application of this Court's precedent. So the Sixth Circuit has done precisely what AEDPA proscribes: "using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico* v. *Lett*, 130 S. Ct. 1855, 1866 (2010).

CONCLUSION

The judgment of the court of appeals should be reversed.

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Dated: MARCH 2013

RESPONDENT'S BRIEF

No. 12-547

In the Supreme Court of the United States

LINDA METRISH, WARDEN,
Petitioner,

v.

BURT LANCASTER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On April 22, 1993, Respondent Burt Lancaster, a former Detroit police officer with a long history of severe mental health problems, killed his girlfriend in broad daylight. At his 1994 trial for first-degree murder, Mich. Comp. Laws § 750.316, and possession of a firearm in the commission of a felony, Mich. Comp. Laws § 750.227b, in the Oakland County, Michigan, Circuit Court, Respondent raised the defense of insanity and, in order to demonstrate the absence of a specific intent to kill, the partial defense of diminished capacity. He presented evidence in support of both without objection. He was convicted as charged, but that trial had been rendered structurally unsound during jury selection by the prosecutor's exercise of a peremptory challenge on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny. *Lancaster v. Adams*, 324 F.3d 423 (6th Cir. 2003), *cert. denied*, 540 U.S. 1004 (2003).

At Respondent's 2005 retrial, he once again sought to offer evidence of diminished capacity, App. 5-9,[1] the admissibility of which had been firmly established and consistently recognized without argument in Michigan since 1973. He was not permitted to offer that evidence, however, as a result of the intervening Michigan Supreme Court decision in *People v. Carpenter*, 627 N.W.2d 276 (Mich. 2001), App. 11, which held that the diminished capacity partial defense

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[1] Respondent did not raise an insanity defense at his retrial.

had been abolished by a 1975 insanity defense statute, Mich. Comp. Laws § 768.21a.[2]

On a separate record, Respondent made an offer of proof as to the diminished capacity evidence he would have presented had he been allowed to do so, including Respondent's medical and psychiatric records from childhood onward and expert testimony as to the nature and extent of his mental problems. Specifically, the testimony would have informed the jury that Respondent's "father and uncle both had long histories of psychiatric problems," that Respondent had two siblings who . . . committed suicide," that he "was a special education student as a child . . [with] a composite IQ of eighty-four (84)," that he began exhibiting serious psychiatric problems in adolescence, that these problems included "suicidal ideation and attempts from about age sixteen (16)," treatment for "a major depressive disorder," treatment for bi-polar disorder, "treatments and hospitalizations . . . in a continuous line from the late eighties ('80s) into early 1993," multiple diagnoses of "major depression, bi-polar, suicidal, paranoid," "substance abuse," a 1990 diagnosis of "chronic depressive psychosis" and a January 1993 diagnosis of "bi-polar disorder, depressed, alcohol dependence, brain injury." The expert testimony would have explained the diagnostic

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[2] Respondent's interlocutory appeals to the Michigan Court of Appeals and the Michigan Supreme Court seeking reversal of the trial court's denial of his motion in limine were unsuccessful. Pet. App. 81a (order of Michigan Court of Appeals denying application for leave to appeal); Pet. App. 79a-80a (order of Michigan Supreme Court denying application for leave to appeal, Cavanagh and Kelly, JJ., dissenting).

significance of Respondent's condition and would have concluded that, at the time of his offense, Respondent "was morbidly clinically depressed," that his "history of special education is related to a particular type of brain damage that render[ed Respondent] . . . more fragile than a normal person, more subject to psychiatric problems than a normal person" and that "his mental illness constitute[d] a major depression and compromised his ability to form the specific intent necessary to constitute First Degree Murder. That, in fact, here there was a dual diagnosis with substance abuse which aggravated the situation resulting in more impulsivity, less ability to reflect, less ability to anticipate consequences." App. 156-160.[3]

SUMMARY OF ARGUMENT

Except as limited by *Rogers v. Tennessee*, 532 U.S. 451 (2001), an accused has a fundamental right to present relevant, competent evidence at trial in support of any defense that was available to him or her at the time of the alleged offense. At the time of Respondent's offense, the right to present evidence of diminished capacity was firmly established, well-settled and widely relied on in Michigan jurisprudence and had been an established part of Michigan law since 1973. Respondent raised this defense at his 1994 trial – a trial rendered fundamentally unfair during jury selection by the prosecutor's exercise of a peremptory

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[3] Respondent would also have offered evidence that, while incarcerated prior to his first trial, he twice attempted suicide and that, throughout the intervening years of incarceration, he has remained under psychiatric care. App. 165.

challenge on the basis of race. See *Batson v. Kentucky*, 476 U.S. 79 (1986). He attempted to raise the defense at his 2005 retrial but was prevented from doing so as a result of the Michigan Supreme Court's 2001 decision in *People v. Carpenter*, 627 N.W.2d 276 (Mich. 2001), which construed the state's 1975 insanity defense statute as having abolished the diminished capacity defense.

Between 1973 and 2001, the viability of the defense was recognized and accepted in over 130 published and unpublished Michigan appellate decisions, was never questioned by any judge in any Michigan Supreme Court or Michigan Court of Appeals decision, was never challenged and was relied on so widely that it had become the subject of a standard jury instruction in the state eight years before Respondent's offense. Even in *Carpenter* itself, the viability of the defense was conceded by the prosecution in both the trial court and the Michigan Court of Appeals; it was only challenged in the Michigan Supreme Court after that court agreed to hear the defendant's appeal raising only the question of the allocation of the burden of proof as to the defense.

The state court's conclusion that *Carpenter* had not changed state law was clearly unreasonable. While the determination as to what constitutes state law is primarily a state law question, this Court makes an independent determination where, as here, a state's reading of its own law is unreasonable or an independent determination is necessary to protect federal constitutional rights.

Carpenter was not only entirely unforeseeable, it was indefensible. In contrast to the year-and-a-day rule at issue in *Rogers*, the diminished capacity defense is not an outdated relic of the common law; it is well-grounded in modern medical and psychological science and helps to produce fairer and more just results, notably, for example, in cases involving returning soldiers suffering from post-traumatic stress syndrome and women suffering from battered woman syndrome. While the states are not required to permit an accused to offer expert testimony to negate specific intent where specific intent is an element of the charged offense, *Clark v. Arizona*, 548 U.S. 735 (2006), the majority of the states allow it, it is admissible in federal trials, and it will continue to be a viable defense in the future.

Precluding Respondent from raising the diminished capacity defense at his retrial was prejudicial to Respondent – a finding by the Sixth Circuit not challenged by Petitioner in this Court – and gave the prosecution a substantial and unwarranted evidentiary advantage at the retrial.

If the Michigan appellate courts had correctly decided Respondent's *Batson* claim following his first trial, the retrial would have occurred prior to the decision in *Carpenter*, and Respondent would unquestionably have been permitted to offer evidence of diminished capacity at his retrial.

Because there was no reasonable basis for the state courts to deny Respondent's request to offer diminished capacity evidence at his retrial, the state courts' denial of that opportunity was a clearly unreasonable application of federal law as established by this Court,

a decision "so lacking in justification" as to be "beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770 (2011).

ARGUMENT

I. At the Time of Respondent's Offense, the Diminished Capacity Partial Defense Was Firmly Established as a Matter of Michigan Law, and *Carpenter* Fundamentally and Unexpectedly Changed Michigan Law.

Except as limited by *Rogers v. Tennessee*, 532 U.S. 451 (2001), an accused has a fundamental right – as part of the right to "a meaningful opportunity to present a complete defense," *California v. Trombetta*, 467 U.S. 479, 485 (1984) – to present competent, reliable evidence relevant to establishing any defense that was available to him or her at the time of the alleged offense. See also *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Because the State denied Respondent the opportunity to exercise this right at his retrial, in violation of this Court's clear holding in *Rogers*, the decision below was correct and should be affirmed.

A. Between 1973 and 2001, diminished capacity was firmly established, well-settled law in Michigan.

The diminished capacity defense was an unquestioned part of Michigan law between 1973 and 2001. Drawing on common law roots that can be traced

to the 1870s,[4] *People v. Lynch*, 208 N.W.2d 738 (Mich. Ct. App. 1973), explicitly recognized the right of a Michigan accused to present evidence of diminished mental capacity to negate the element of specific intent in a case requiring such proof. Because it was so fully consistent with already-settled law, *Lynch* generated neither controversy nor opposition; it was accepted and routinely relied on.

As a published Court of Appeals decision, *Lynch* had precedential effect. That is, it was "controlling statewide until contradicted by another panel of the Court of Appeals or reversed or overruled by [the Michigan Supreme] Court." *Tebo v. Havlik*, 343 N.W.2d 181, 185 (Mich. 1984).[5] Far from being a mere

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[4] See *People v. Walker*, 38 Mich. 156 (1878) (where accused "for any reason whatever" lacks the specific intent to commit a specific intent crime, "the crime cannot have been committed"); *Roberts v. People*, 19 Mich. 401, 417-18 (1870) ("[I]t was therefore material to inquire whether the defendant's mental faculties were so far overcome by the effect of intoxication, as to render him incapable of entertaining the intent."); see also *People v. Langworthy*, 331 N.W.2d 171, 172-73 (Mich. 1982) (discussing early nineteenth century development of rule allowing evidence of voluntary intoxication to "'negative the existence of *specific intent*'" (emphasis in original)).

[5] See also Mich. Ct. R. 7.215(C)(2) ("A published decision of the Court of Appeals has precedential effect under the rule of stare decisis."). Consider also: "'If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have *a right* to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it.' 1 J. Kent, Commentaries *475-*476 (emphasis added). See also Hamilton's statement in The Federalist: 'To avoid an arbitrary discretion in the courts, it is

"suggest[ion] that a diminished-capacity defense might be available," Pet. Br. 9, judicial recognition of the diminished capacity defense was precedentially binding in Michigan until *Carpenter* abruptly and unexpectedly construed Michigan's insanity defense statute otherwise in 2001.

In 1975, the Michigan Legislature codified the insanity defense. Mich. Comp. Laws § 768.21a. For the next twenty-six years, Michigan courts continued to recognize, without any question whatever, the continued existence of the diminished capacity defense. Indeed, in 1978, the Michigan Court of Appeals modified *Lynch*, expressly holding that the 1975 statute encompassed the diminished capacity defense and that an accused raising the defense must comply with the procedural requirements set out in Mich. Comp. Laws § 768.21. *People v. Mangiapane*, 271 N.W.2d 240, 249 (Mich. Ct. App. 1978);[6] see also *People*

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indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.' The Federalist No. 78, p. 471 (C. Rossiter ed. 1961)." *Rogers*, 532 U.S. at 473 n.2 (Scalia, J., dissenting) (emphasis in original).

[6] Petitioner incorrectly claims that *Mangiapane* rests on the court "[a]ssuming (but not deciding) that such a defense even existed." Pet. Br. 18. This claim is undone by both the language and the reasoning of the decision. See, *e.g.*, 271 N.W.2d at 249 ("We find that the defense known as diminished capacity comes within this codified definition of legal insanity. We further find that psychiatric testimony on the issue of defendant's capacity to form the specific intent comes within the codified definition of legal insanity. By thus categorizing defendant's defense we do not preclude the admission of evidence supporting defendant's claim

v. Mette, 621 N.W.2d 713, 719 (Mich. Ct. App. 2000) ("This [c]ourt has consistently held that the defense of diminished capacity comes within the codified definition of legal insanity and is subject to the same procedural requirements.").

As the Sixth Circuit recognized below, in the twenty-eight years between the decisions in *Lynch* and *Carpenter*, the diminished capacity defense was "widely used and accepted" in Michigan. Pet. App. 22a. In fact, a WestLaw search reveals that between the effective date of § 768.21a and the date of decision in *Carpenter* – and excluding cases discussing diminished capacity solely in relation to intoxication – the diminished capacity defense was recognized in approximately *130* cases of the Michigan Supreme Court and the Michigan Court of Appeals, and that *not one* of those cases even questioned the validity of the defense.[7] Contrary to Petitioner's claim that the

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that, although not legally insane, he lacks mental capacity to entertain the specific intent that is a necessary element of assault with intent to commit murder. But, we hold that defendant must give the notice required by the statute of intention to assert that defense.").

[7] Excluding cases raising the diminished capacity defense solely in relation to intoxication, between the effective date of § 768.21a and the date of Respondent's offense, the existence of the diminished capacity defense was recognized in approximately thirty-seven cases, of which thirty-three were published Michigan Court of Appeals cases and four were Michigan Supreme Court cases; and between the date of Respondent's offense and the decision in *Carpenter*, the existence of the defense was recognized in approximately ninety-six cases, of which nine were published and eighty-three were unpublished Michigan Court of Appeals cases,

Michigan Supreme Court "expressed its disapproval of a diminished-capacity defense" in *People v. Ramsey*, 375 N.W.2d 297, 304 (Mich. 1985), Pet. Br. 19, the case manifests the court's clear *acceptance* of the diminished capacity defense. Immediately following the language cited by Petitioner, the court states: "'[M]ental abnormality may nonetheless be a most relevant consideration in the determination of whether he is guilty of the crime charged. *Under the doctrine referred to as partial responsibility, diminished responsibility, or (somewhat less accurately) partial insanity, evidence concerning the defendant's mental condition is admissible on the question of whether the defendant had the mental state which is an element of the offense with which he is charged.*'" *Id.* (quoting LaFave & Scott, *Criminal Law* § 42, p. 326 (emphasis added)).

The defense was so well-established and was raised at trials with sufficient frequency that, eight years before Respondent's offense, it was included among the standard criminal jury instructions drafted by the State Bar of Michigan's criminal jury instructions

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and four were Michigan Supreme Court cases. See Addendum. Its pre-*Carpenter* validity continued to be recognized post-*Carpenter*. See, *e.g.*, *People v. Yost*, 749 N.W.2d 753, 766 (Mich. Ct. App. 2008) ("Before the decision in *Carpenter*, a defendant who was otherwise legally sane could present evidence of some mental abnormality to negate the specific intent required to commit a particular crime."); *People v. Smith*, No. 229661, 2003 WL 2008207, at *2 n.1 (Mich. Ct. App. May 1, 2003) (unpublished) (noting that the defense had been "viable at the time of defendant's trial in April 2000").

committee and utilized extensively throughout the state.[8]

The defense was also so thoroughly accepted that, throughout this entire period, *no* Michigan decision and *no* opinion in any Michigan case so much as questioned, let alone challenged the validity of, the diminished capacity defense. No appellate decision even suggested that any Michigan prosecutor ever objected to the admissibility of evidence in support of it. In fact, just four days before *Carpenter* was decided, the Michigan Court of Appeals issued a decision recognizing the defense without any question whatever as to its viability. *People v. Rouse*, No. 219433, 2001 WL 733236, at *1-2 (Mich. Ct. App. June 8, 2001) (unpublished).[9]

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[8] See *Michigan Criminal Jury Instructions*, Supp. 1985 (Inst. of Continuing Legal Educ. 1985) § 6:1:02A (added by the Committee June 22, 1985; re-numbered as § 6.3 in 2nd edition in 1989; removed only after *Carpenter* decided). Use of the standard criminal jury instructions, while not mandatory, is routine, as the instructions represent a consensus of Michigan's legal community. The Sixth Circuit aptly noted in the instant case that the instructions are "'used extensively by Michigan judges, prosecutors, and defense attorneys to instruct juries in criminal cases fairly and accurately.'" Pet. App. 19a (quoting Standing Comm. on Std. Crim. Jury Instructions, Mich. State Bar, 1 *Mich. Criminal Jury Instructions*, at ix (2d ed. 1989)).

[9] Until November 1, 1990, a panel of the Michigan Court of Appeals was free to rule contrary to an earlier panel on any given issue. Mich. Ct. R. 7.215(J)(1). None did with respect to diminished capacity. Since November 1, 1990, subsequent panels have been required to follow the ruling of the first panel to decide an issue but have been free to indicate disagreement with the

The facts and appellate history of *Carpenter* are also illustrative. Carpenter, who was charged, *inter alia*, with home invasion, Mich. Comp. Laws § 750.110a(2), and felonious assault, Mich. Comp. Laws § 750.82, argued at trial that he lacked the mental capacity to form the specific intent necessary to commit those offenses, and he offered lay and expert testimony in support of that defense. 627 N.W.2d at 278-79. The prosecution did not object to the admission of this evidence, nor did it argue in the Michigan Court of Appeals that evidence of diminished capacity was inadmissible; in the Court of Appeals, the prosecution *agreed* that the defense was available and argued *only* the allocation of the burden of proof.[10]

When the Michigan Supreme Court granted leave to appeal in the case, the sole issue presented was the allocation of the burden of proof. 627 N.W.2d at 277.

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earlier panel's decision. Mich. Ct. R. 7.215(J)(2). None did with respect to diminished capacity.

[10] *People v. Carpenter*, No. 204051, 1999 WL 33438799, at *1 (Mich. Ct. App. July 16, 1999) (amended unpublished opinion) ("Plaintiff correctly maintains that when the Legislature amends existing statutes, it is presumed to act with knowledge of appellate court statutory interpretations. *According to plaintiff*, therefore, it follows that because the Legislature had not specifically included the diminished capacity defense by name in the insanity statute prior to *Mangiapane*, and because the 1994 amendment did not otherwise change the definition of insanity or the procedural requirements imposed by the statute, *it must be presumed that the Legislature, aware of this Court's inclusion of the diminished capacity defense within the codification of the insanity defense, intended that this Court's construction of the insanity statute remain in force.*" (emphasis added) (citations omitted)).

Only *after* the defendant had submitted his appellate brief did the prosecution challenge the viability of the defense.[11] The court then decided the case on the basis of that belated challenge.[12] Even then, however, in the course of its opinion, the *Carpenter* majority inadvertently conceded the validity of the defense to date, titling a section of the opinion "The *Continued* Viability of the Diminished Capacity Defense in Michigan." *Id.* at 282 (emphasis added). The parties in *Carpenter* did not brief the retroactivity issue, and neither the majority nor the dissent considered issues of retroactivity; there is not one word in either opinion discussing the due process implications of construing a 1975 statute to apply to conduct that occurred after 1975 but before the court's construction of the statute in 2001.

In sum, nothing in the history of Michigan's treatment of the diminished capacity defense foreshadowed *Carpenter* or gave citizens or practitioners even a hint that the right to present

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[11] Despite a court rule explicitly limiting the issues on an appeal to "the issues raised in the application for leave to appeal" "[u]nless otherwise ordered by the Court," Mich. Ct. R. 7.302(F)(4)(a) [now Mich. Ct. R. 7.302(H)(4)(a)], the prosecution neither sought nor obtained the court's permission to do so, prompting the defense to move to strike that portion of its brief. 627 N.W.2d at 277 n.1.

[12] In dissent, Justice Kelly, joined by Justice Cavanagh, stated that she was "troubled that the majority is deciding this case on a ground that the prosecutor never argued until its brief on appeal to this Court. To the extent that this Court rejects arguments not raised below by criminal defendants, it should reject those not raised below by the prosecution." *Id.* at 255-56 (Kelly and Cavanagh, JJ., dissenting).

evidence of diminished capacity was at risk of being eliminated at all, let alone retroactively.

B. In holding that a 1975 statute had abolished the diminished capacity defense, *Carpenter* fundamentally and unexpectedly changed Michigan law.

In the underlying case, the Michigan Court of Appeals held – and Petitioner argues – that, the abundant historical record notwithstanding, *Carpenter* did not effect a change in law because it represented the first time the Michigan Supreme Court interpreted an unambiguous statute. The argument does not withstand analysis: It ignores the nature of the common law, the rule of stare decisis and the plain language of Mich. Ct. R. 7.215(C)(2), which, as a court rule, was adopted by the Michigan Supreme Court, Mich. Const. 1963, art. 6, §5; it takes wholly out of context the case on which it relies, *People v. Doyle*, 545 N.W.2d 627 (Mich. 1996); it relies on an unrecognizable conception of the word "unambiguous"; and it ignores the practical consequences of its assertion.

Petitioner's argument that Michigan courts had assumed but never decided the existence of the diminished capacity defense is not only untrue, it is legally irrelevant. As the Michigan Supreme Court stressed in *People v. Aaron*, 299 N.W.2d 304, 323-24 (Mich. 1980) (emphasis added), with respect to points of law assumed but not previously explicitly decided, "our finding that Michigan has never specifically adopted the doctrine which defines malice to include the intent to commit the underlying felony is not the end of our inquiry. *In Michigan, the general rule is that*

the common law prevails except as abrogated by the Constitution, the Legislature or this Court."[13], [14] This follows for multiple reasons: *Lynch*, *supra*, was decided on the basis of the common law, and the Michigan Constitution itself provides that "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Mich. Const. 1963, art. 3, §7. As noted above, as a published Michigan Court of Appeals decision, *Lynch* had precedential effect under the rule of stare decisis; it was *the* law in the state until

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[13] See also *People v. Stevenson*, 331 N.W.2d 143, 144 (Mich. 1982) (rejecting prosecution argument that the court had never "'adopted'" the year-and-a-day rule because reliance on it in earlier case was dictum; prosecutor's "argument misses the point. In Michigan, the common law prevails except as abrogated by the Constitution, the Legislature, or this Court," citing Mich. Const., art. 3, §7, and *Aaron*).

[14] Petitioner's citation to *In re Apportionment of State Legislature – 1982*, 321 N.W.2d 565, 571 (Mich. 1982), and *Allen v. Duffy*, 4 N.W. 427 (Mich. 1880), Pet. Br. 19, for the proposition that an assumed point of law is considered not to have been decided is significantly misleading, since Petitioner ignores – and neither case addresses – the jurisprudential effect of a Court of Appeals decision as to a point not explicitly ruled on by the Supreme Court. The Michigan Court of Appeals could not have spoken to the point of law considered by the Supreme Court in *In re Apportionment*, as the Court of Appeals has no jurisdiction regarding such matters; *Allen* could not have considered the question because it was decided 85 years before the Michigan Court of Appeals came into existence. Notably, both Petitioner's brief and the citation in *In re Apportionment* relied on by Petitioner omit the key language from *Aaron* cited above.

overruled.[15] *Lynch* and its progeny expressed uncontradicted Michigan law on the subject of diminished capacity for twenty-eight years, as thoroughly evidenced by the extent to which it was followed and not in any way questioned in any appellate decision.

In stark contrast with the facts at bar, *Doyle* involved retroactivity as to an issue of law that was plainly unsettled at the time of the defendant's offense – the relationship between Michigan's habitual offender statute[16] and its felony drunk driving statute.[17] Promptly after two Michigan Court of Appeals decisions held that the habitual offender statute did not apply in felony drunk driving cases,[18] the Michigan Supreme Court granted leave to appeal in *Bewersdorf* in order to decide the question nearly a

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[15] *Cf. United States v. Lanier*, 520 U.S. 259, 268-69 (1997) (decisions of federal courts of appeals and other courts are relevant in determining whether an accused had fair notice that his or her conduct was within the scope of a federal criminal law).

[16] Mich. Comp. Laws § 769.10 *et seq.* Michigan's habitual offender statute does not create a separate offense but, instead, provides for enhanced punishment in the cases of individuals convicted of multiple felonies. The statute applies to all felonies, without exception for any category of felony or felonies.

[17] Mich. Comp. Laws § 257.625(6)(d), now Mich. Comp. Laws § 257.625(9)(c).

[18] See *People v. Tucker*, 441 N.W.2d 59 (Mich. Ct. App. 1989) (person convicted on two or more occasions of operating a motor vehicle while intoxicated–third offense may not be charged as an habitual offender); *People v. Bewersdorf*, 450 N.W.2d 271 (Mich. Ct. App. 1989) (same), *rev'd*, 475 N.W.2d 231 (Mich. 1991).

full year *before* Doyle's offense, *Doyle*, 545 N.W.2d at 629. The Michigan Supreme Court had never previously expressed any view on the issue, either in holding or dictum. In those circumstances, the court's conclusion in *Doyle* that its decision in *Bewersdorf* was "not . . . unforeseeable," 545 N.W.2d at 631, was understandable. The rule established by the Court of Appeals in *Tucker* and *Bewersdorf* never had a meaningful foothold in Michigan jurisprudence, and the Michigan Supreme Court's conclusion that it was merely correcting an erroneous Court of Appeals construction of an unambiguous statute, *id.* at 632, was entirely reasonable.

Further, the instant case does not involve an "unambiguous and clear" statute. Not only is § 768.21a entirely silent as to diminished capacity, it is also silent as to any intent either to enumerate all available defenses or partial defenses or to abolish diminished capacity or any other judicially recognized defense. Between the time the statute was enacted in 1975 and the decision in *Carpenter* in 2001, *every* appellate judge in Michigan writing or voting on the issue found diminished capacity to remain viable following enactment of the statute, as did two dissenting justices in *Carpenter*, 627 N.W.2d at 285 (Kelly and Cavanagh, JJ., dissenting). *Not one* appellate decision suggests that even one prosecutor argued that the statute had abolished the defense. Even in *Carpenter* itself, as noted above, the prosecution did not offer its abolition interpretation of the statute until *after* leave to appeal had been granted in the Michigan Supreme Court and *after* it had agreed in the Michigan Court of Appeals that the defense was, in fact, viable and that the

statute had changed only the allocation of the burden of proof, see *Carpenter*, 1999 WL 33438799, at *1.

Accepting Petitioner's argument would invite all of the practical evils that stare decisis is meant to – and does – avoid. The public has a right to rely on the understanding that binding precedents of state courts apply to conduct that occurs while those precedents are in effect. Any system that simultaneously acknowledges the binding nature of *and* disavows the right to rely upon stare decisis would invite utter chaos. Criminal court judges, prosecutors and defense attorneys must be able to rely on the existing state of the law in their important decisions as to what defenses may be raised and/or should be objected to; what evidence may properly be offered, objected to or admitted; what instructions should be given to juries; how scarce financial resources should be allocated in deciding whether or not to retain experts; and how staff should be trained.

Even the dissenting judge in the Sixth Circuit labeled as "illogical" the State's claim that abolishing the diminished capacity defense did not change the law, Pet. App. 30a, but the claim is beyond illogical; it is fantastical. *Carpenter* did not incrementally change Michigan law as it developed moving forward. In a single utterly unexpected and jolting act, it wiped off the books – and attempted to wipe from the historical record – twenty-eight years of established law. *Carpenter* was neither resolving a split of lower court authority nor writing on a clean slate. It was unquestionably and fundamentally changing settled existing law.

Re-writing history may be common in despotic regimes, but it is incompatible with fundamental notions of fairness and the integrity of our legal system. Petitioner may no more write the diminished capacity defense out of Michigan legal history than one may re-write the last act of a drama. Act III of *Rigoletto* cannot be re-written in order to save Gilda.

C. This Court independently determines the status of state law when necessary to protect federal constitutional rights.

Contrary to Petitioner's and State Amici's argument, the Sixth Circuit did not invade the province of the states to determine state law. While the determination as to what constitutes state law is primarily a state law question, this Court makes an independent determination of what state law was when a state's reading of its own law is unreasonable or when doing so is necessary to protect constitutional rights. As Chief Justice Rehnquist stressed for the Court in comparable circumstances in *Collins v. Youngblood*, 497 U.S. 37, 46 (1990), "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause. Subtle *ex post facto* violations are no more permissible than overt ones. . . . [T]he constitutional prohibition is addressed to laws, 'whatever their form,' which make innocent acts criminal, alter the nature of the offense, or increase the punishment." See also *Clark v. Arizona*, 548 U.S. 735, 798 (2006) (Kennedy, J., dissenting) ("But there are obviously constitutional limits beyond which the States may not go in this regard [labeling criminal offenses]. If it were otherwise, States could label all evidentiary exclusions

as redefinitions and so evade constitutional requirements." (citation and internal quotation marks omitted)); *Rogers*, 532 U.S. at 469 (Scalia, J., dissenting) (limiting the binding nature of a state's reading of its own law to "*reasonable* reading of state law" (emphasis added)).[19], [20]

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[19] See also *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2602 (2010) ("Neither the Florida Legislature by statute, nor the Florida courts by judicial decree , may accomplish the result the county seeks simply by recharacterizing the principal as 'public money.'" (citation and internal quotation marks omitted)); *Williams v. Taylor*, 529 U.S. 362, 379 (2000) (Stevens, J., plurality opinion) ("[It] is the federal courts' independent responsibility – independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States – to interpret federal law. A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution."); *Howlett v. Rose*, 496 U.S. 356, 366 (1990) ("Whether the constitutional rights asserted by petitioner were given due recognition by the [Court of Appeal] is a question as to which the [petitioner is] entitled to invoke our judgment. . . . It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support."); *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975) (Court will "re-examine[] a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue'").

[20] Amicus Wayne County's argument that *Carpenter*'s abolition of the diminished capacity defense was a mere change in evidentiary rules is belied not only by the obvious substantive nature of the change but also by the Michigan Supreme Court's own rejection of

Whether retroactive abolition of a common law defense violates due process is a question properly before the federal courts. Indeed, that is precisely the issue that this Court considered – after conducting a searching review of state court precedent – in *Rogers*. 532 U.S. at 464-67; see also, *e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 356-62 (1964) (reviewing state court interpretations of criminal trespass statute before concluding that "[t]he pre-existing law gave petitioners no warning whatever that this criminal statute would be construed, despite its clear language and consistent judicial interpretation to the contrary, as incorporating a doctrine found only in civil trespass cases"); *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam) (trial court's construction of the term "arrest" as including a traffic citation under state law, and application of that construction to defendant to revoke his probation, was unforeseeable and thus violated due process).

Respondent did not ask the district court or the Sixth Circuit – and is not now asking this Court – to determine whether the Michigan courts' interpretation of the effect of the insanity statute (or its amendment) on the diminished capacity defense was correct. The State is free to apply its interpretation prospectively – just as every justice of the Michigan Supreme Court agreed that court must do when it abolished the state's

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any such distinction in *Carpenter*, 627 N.W.2d at 284 n.9: "[W]e find to be irrelevant the largely procedural distinction between the affirmative defense of legal insanity and the use of diminished capacity evidence."

year-and-a-day rule.[21] What the State was not free to do, however, was retroactively construe state law in a manner that denied Respondent due process.[22]

Ultimately, this Court's obligation to review an unreasonable state court determination of state law when necessary to protect federal constitutional rights is grounded in the Supremacy Clause. U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the

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[21] See *Stevenson*, 331 N.W.2d at 147-48 (rejecting retroactive application of abolition of the rule as violative of due process, where victim died 369 days after being shot, notwithstanding prosecutor's argument that the rule was merely evidentiary or procedural, because "[t]he key is the importance of the rights concerned and their effect on the defendant, not whether those rights can be characterized as 'merely' evidentiary or procedural" (citations and internal quotation marks omitted)).

[22] The State Amici cite *Fiore v. White*, 531 U.S. 225 (2001), a case that involved a post-conviction Pennsylvania Supreme Court construction of a statute that made clear that the defendant's conduct did not fall within its scope, for the proposition that this "Court relied on a state court assessment of the retroactive application of an intervening decision to conclude that due process was not at issue." Ind. Br. at 13. Amici's argument is doubly misleading. First, the Court did *not* seek *any* input from the Pennsylvania Supreme Court regarding retroactivity or due process principles – and rightly so, as these were questions of federal constitutional rights that were properly the responsibility of this Court. Second, in clear contrast to the Michigan courts' treatment of the diminished capacity defense, the Court noted that Pennsylvania's lower courts had previously been "divided in their interpretation" of the statute; "for that reason" this Court simply asked the Pennsylvania court for its view as to whether its post-offense interpretation of the relevant statute "state[d] the correct interpretation of the law of Pennsylvania." *Fiore v. White*, 528 U.S. 23, 29 (1999).

United States which shall be made in pursuance thereof . . . , shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."). If the Supremacy Clause means anything, it means that this Court may not permit a state to evade federal constitutional rights by denying the reality of long-settled, widely applied state law.

Where, as here, the disparity between the indisputable historical record and the State's claim is so extreme, this Court's obligation independently to determine the status of prior state law is also grounded in its duty to protect the integrity of the judicial process and public confidence in the legal system.

Any reasonable evaluation of the state of Michigan's law as to diminished capacity can only conclude that the defense existed and was well-established and well-settled at the time of Respondent's offense. The Sixth Circuit's conclusion as to this point was the only possible correct conclusion.

II. Because *Carpenter*'s Change in Law Was Unforeseeable and Indefensible, the Michigan Court of Appeals Unreasonably Applied Clearly Established Federal Law when It Concluded that Due Process Permitted *Carpenter* to Be Applied Retroactively in Respondent's Case.

A. *Carpenter*'s change in law was unforeseeable and indefensible by reference to the law that had been expressed prior to the conduct in issue.

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d)(1), provides for the granting of a petition for writ of habeas corpus if a state court's adjudication of a petitioner's claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Here, the Michigan Court of Appeals unreasonably applied clearly established Federal law, as set forth in this Court's decisions in *Bouie*, *supra*, and *Rogers*, *supra*.

In *Bouie*, this Court held that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, s 10, of the Constitution forbids . . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." 378 U.S. at 353-54. Thus, the South Carolina Supreme Court was

forbidden from retroactively applying an expanded interpretation of its trespass statute where that interpretation had "not the slightest support in prior South Carolina decisions." *Id.* at 356. In *Rogers*, where this Court upheld the decision of the Tennessee Supreme Court retroactively abolishing the common law year-and-a-day rule, the Court held that "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." 532 U.S. at 462 (citations and internal quotation marks omitted).

The harm to the affected individual wrought by judicially-imposed retroactivity is the same as that resulting from retroactivity imposed by legislation, which both Madison and Hamilton found to be anathema. As Madison noted in The Federalist No. 44, p. 282 (C. Rossiter ed. 1961), "*ex post facto* laws . . . are contrary to the first principles of the social compact and to every principle of sound legislation." Similarly, Hamilton considered ex post facto laws to be among the three protections he deemed "greater securities to liberty and republicanism than any [the Constitution] contains." *Id.*, No. 84, at 511.

Because the Michigan Court of Appeals unreasonably determined that *Carpenter* did not change Michigan law, it did not analyze whether *Carpenter* was unexpected or indefensible. However, not a single factor that this Court found justified retroactivity in *Rogers* is present here. The only reasonable conclusion the Michigan Court of Appeals

could have reached consistent with clearly established federal law was that *Carpenter* could not be applied retroactively to prevent Respondent from once again presenting evidence of diminished capacity at his retrial. See *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011), discussed *infra*. Every factor articulated by this Court in *Rogers* illustrates just how unexpected and indefensible the *Carpenter* decision was.

First, the diminished capacity defense was not and is not an "outdated relic of the common law." *Rogers*, 532 U.S. at 462-63 (tracing history of year-and-a-day rule from 13th century onward). While Rogers did "not even so much as hint that good reasons exist for retaining the rule," *id.* at 463, and while the rule was premised on the *inability* of medical science to render appropriate determinations, the modern diminished capacity defense is the result of *advances* in medical and psychological science. Rather than "advances in medical and related science hav[ing] so undermined the usefulness of the rule as to render it without question obsolete," *id.*, scientific advances have rendered the diminished capacity defense *more* viable.[23]

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[23] As the Sixth Circuit stressed below, "[i]n recent decades, the scientific community's knowledge and understanding of mental illnesses has greatly increased. And these scientific advancements have worked to provide *greater* support for the diminished-capacity defense, not lesser." Pet. App. 21a-22a (citation omitted; emphasis in original). Quoting from the Surgeon General's 1999 Mental Health Report, the court noted that the report had been "'issued at the culmination of a half-century that has witnessed remarkable advances in the understanding of mental disorders and the brain.'" *Id.*

Second, the Court noted that "the year and a day rule has been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue." *Id.* Seizing on this factor, Petitioner's sole argument that *Carpenter* was foreseeable relies on the seriously inaccurate claim that the diminished capacity defense "began losing its legitimacy" after a high-publicity 1978 California case raised a so-called "'twinkie' defense" variation of diminished capacity. Pet. Br. 23-24. Whether the defense in that case abused the diminished capacity doctrine or achieved a conviction of a lesser offense for substantial but less sensational reasons[24] is beside the point. As noted above, advances in medicine and psychology have made it abundantly clear that evidence of an accused's capacity to form the specific intent to commit a crime can be competent and relevant. In many cases – including, notably, cases involving returning soldiers who suffer from post-traumatic stress disorder and victims of domestic violence who suffer from battered woman syndrome – the availability of such evidence, whether labeled as evidence of a diminished capacity partial defense or as evidence negating an element of the charged offense, can be instrumental in achieving a better calibrated and, therefore, more just result, for the community as well as for the accused.

Disparaging diminished capacity as "the 'twinkie' defense," Petitioner inaccurately asserts that it had

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[24] See *People v. White*, 117 Cal. App. 3d 270, 277 (1981) (summarizing testimony as to the defendant's mental health history and condition at the time of the offense).

been receding "long before Lancaster's trials."[25] Pet. Br. 24. To the contrary, the admissibility of mental condition evidence to negate an element of charged specific intent offense has not been in decline at any time in the recent past, let alone before Respondent's offense in 1993.[26] As of 2006, "a substantial majority of

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[25] For purposes of the due process inquiry, it is the time of the offense, not the time of the trials, that is relevant. *E.g.*, *Bouie*, 378 U.S. at 354 (rejecting retroactive application of judicial construction of statute where statutue "did not give them fair warning, at the time of their conduct . . , that the act for which they now stand convicted was rendered criminal by the statute").

[26] Of the twenty cases cited by Petitioner, *not one* supports its position. First, *none* involve a pre-1993 change in the law regarding admissibility of diminished capacity evidence, and only one, *State v. Pennington*, 132 P.3d 902 (Kan. 2006), involves a change in law subsequent to the date of Respondent's offense. Second, *six* hold that diminished capacity *is* a partial defense, however termed, in the sense that evidence of mental illness is admissible to negate mens rea where the charged offense requires proof of specific intent. See *id.* at 907-08 (Kansas, by statute, abolished both the insanity and diminished capacity defenses, but continues to permit "evidence of a mental disease or defect that negates the mental state element of the crime charged"); *Commonwealth v. Finstein*, 687 N.E.2d 638, 639-40 (Mass. 1997) (no "defense" of diminished capacity in Massachusetts, but "no basis for concluding" expert testimony should not be permitted to show lack of capacity to form mental state); *Davis v. State*, 313 S.W.3d 317, 328 (Tex. Crim. App. 2010) ("There is no such thing as an 'affirmative defense of diminished capacity' in Texas (other than insanity), but evidence of a mental disease or defect may be relevant and admissible to rebut or disprove the defendant's culpable mens rea."); *State v. Grose*, 982 S.W.2d 349, 353 (Tenn. Crim. App. 1997) (diminished capacity not a complete defense capable of excusing or defeating criminal charge, but evidence admissible when it negates mens rea); *State v. Klafta*, 831 P.2d

the States . . . allow[ed]" "the use of mental-illness evidence to negate *mens rea*." *Clark*, 548 U.S. at 800 (Kennedy, J., dissenting). Such evidence is admissible in federal criminal trials. See, *e.g.*, *United States v. Pohlot*, 827 F.2d 889, 897 (3d Cir. 1987) (evidence that disproves an element of the charged offense admissible pursuant to Insanity Defense Reform Act of 1984), and its progeny. No state has recently eliminated an accused's right to offer such evidence. The Model Penal Code, too, provides for the admissibility of evidence of "a mental disease or defect . . . whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of a crime." Model Penal Code § 402(1).

Because the states are not required to permit expert testimony on diminished capacity, *Clark*, *supra*, debate as to whether it should be admissible, and if so, under what conditions, will likely continue for the indefinite future. While the debate will continue, the fact of a debate does not make Petitioner's wished-for outcome

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512, 516-17 (Haw. 1992) (although Hawaii "does not recognize a diminished capacity defense as such," "[h]ad appellant been offering to prove [by expert testimony] that because of a physical or emotional disease, disorder or defect, she was incapable of forming the intent to murder [victim], then the court, under . . . [Hawaii law], would have suspended the trial, either discharged or not discharged the jury in its discretion, and required a mental examination as outlined in that section. But appellant expressly was not raising such a defense."); *State v. Plowman*, 386 N.W.2d 546, 547-48 (Iowa Ct. App. 1986) (diminished capacity is a defense to specific intent crimes only). Third, the remaining fourteen cases simply reaffirm that the defense had never been recognized in the particular state and thus say nothing about whether the defense was "receding."

either foreseeable or likely. The underlying science portends retention and expansion of the right, however labeled, not its elimination. Unlike the year-and-a-day rule, the tide of knowledge and viability as to diminished capacity is flowing in, not out.

Third, this Court noted in *Rogers* that, "perhaps most importantly, at the time of petitioner's crime the year and a day rule had only the most tenuous foothold as part of the criminal law of the State of Tennessee," 532 U.S. at 464, because it "did not exist as part of Tennessee's statutory criminal code . . . . [and] had never once served as a ground of decision in any prosecution for murder in the State. Indeed, in all the reported Tennessee cases, the rule has been mentioned only three times, and each time in dicta," *id.* While the rule was a "'substantive principle' of the common law of Tennessee . . . , it was a principle in name only, having never once been enforced in the State," *id.* at 466, a fact that was "surely relevant to whether the court's abolition of the rule in petitioner's case violated due process limitations on retroactive judicial decisionmaking," *id.* In stark contrast, as noted above, the diminished capacity defense was thoroughly recognized in Michigan jurisprudence. In addition to *Lynch*, it was recognized in approximately 130 Michigan appellate cases decided between the adoption of the state's insanity defense statute and the date of decision in *Carpenter*, and its validity was not questioned by *any* justice or judge in *any* of those cases.

As set out in detail above, the diminished capacity defense was an integral, well-established, and unquestioned component of Michigan law up until the moment *Carpenter* abolished it. Here, the district court

judge, and Chief Judge Batchelder in dissent in the Sixth Circuit, both relied heavily on the erroneous claim that diminished capacity had never served as the basis for any court's decision in Michigan. Pet. App. 51a, 32a. To the contrary, *Lynch*, *supra* – the very case first recognizing the defense in modern Michigan jurisprudence – was decided precisely on that ground: Lynch's conviction was reversed because the trial court had rejected proposed defense testimony on diminished capacity. 208 N.W.2d at 662-63. The existence of the diminished capacity defense was also a basis for the Michigan Supreme Court's decision in *People v. Griffin*, 444 N.W.2d 139, 140 (Mich. 1989) (emphasis added), where the Court vacated, reversed and remanded the decision below based on "defendant's claim that *trial counsel was ineffective for failing to . . . explore defenses of diminished capacity* and insanity." At least as significant, once *Lynch* was decided, the admissibility of evidence of diminished capacity was so thoroughly accepted in Michigan practice that there was virtually no occasion for appellate litigation regarding trial court decisions on admissibility. The appellate record post-*Lynch* and pre-*Carpenter* discloses neither any case in which the defense sought to introduce evidence of diminished capacity but was categorically precluded from doing so by the trial court nor any case in which the prosecution objected to the admission of diminished capacity evidence. In addition, as noted above, even in *Carpenter* itself, the defense evidence of diminished capacity was admitted at trial *without objection*.

Moreover, unlike the Tennessee Supreme Court in *Rogers*,[27] where that court considered whether its decision should be applied retroactively, as also noted above, the Michigan Supreme Court in *Carpenter* engaged in no retroactivity analysis whatever. Neither the majority nor the dissent addressed the issue at all, yet the court's decision bound the Michigan Court of Appeals in the instant case.

In fashioning the *Rogers* "unexpected and indefensible" standard, this Court explained that the differences between legislative acts and statutory interpretation, on the one hand, and common law judging, on the other, justified a distinction between the stringency of the ex post facto clause and the flexibility of the due process clause. The Court was careful to note that, in abolishing the year-and-a-day rule, the Tennessee court had engaged not in statutory interpretation but in common law judging, in which context "there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. . . . Strict application of *ex post facto* principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of ex post facto principles." *Rogers*, 532 U.S. at 461.

Unlike *Rogers*, *Carpenter* was not an exercise of pure common law judging as to which *Rogers* permits

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[27] *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999).

the most flexibility. In *Carpenter*, the Michigan Supreme Court engaged in both statutory interpretation and common law judging, as had every Michigan court that had concluded that diminished capacity as a common law defense existed within the procedural framework of the insanity defense statute. The effect of *Carpenter*, however, was more akin to the effect of a statutory enactment than to the "incremental . . . development of precedent" that typifies common law judging. In these circumstances, *Rogers* teaches that a court may not act in a manner the legislature could not.

When comparing the authority of a court and a legislature to change substantive law retroactively, it must also be remembered that the due process clause protects an individual against a deprivation of rights by the State, not just any particular branch of the State. Justice Scalia underscored this point for the Court in analogous circumstances in *Stop the Beach Renourishment*, 130 S. Ct. at 2601, when the Court stressed as to the takings clause, U.S. Const. amend. V – which, like the due process clause, "is not addressed to the action of a specific branch or branches," – "It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat." Given the liberty interests at stake in a case involving the due process clause, the same principle applies with even greater force in a criminal case and prohibits a court, in these circumstances, from acting in a manner that would be forbidden to a legislature.

Retrospective application of *Carpenter* to the facts of the instant case is further indefensible for the

following reasons: Respondent not only had a clear right to raise a diminished capacity partial defense as of the date of his defense, he, in fact, raised it at his first trial; Respondent's first trial was rendered fundamentally unfair as a result of prosecutorial misconduct during jury selection when the prosecutor exercised a peremptory challenge on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); allowing *Carpenter* to be applied retrospectively gave the prosecution a substantial and unwarranted evidentiary advantage at the retrial as a result of its own misconduct; as found by the Sixth Circuit and not challenged by Petitioner in the Petition for Certiorari, the preclusion of evidence of Respondent's diminished capacity was prejudicial to him; and, if Michigan's appellate courts had correctly decided Respondent's *Batson* claim, the retrial would have occurred prior to the decision in *Carpenter*, and Respondent would unquestionably have been able to raise diminished capacity at his retrial.

Petitioner and the State Amici also argue that, because of Respondent's diminished capacity, the change in Michigan law need not have been foreseeable in order to apply to him – that is, that the right to fair notice is inapplicable here – since a person with a diminished capacity could not have formed the specific intent to rely on the status of the law. Pet. Br. 25-26; Ind. Br. 3-10. This argument is as misguided as it is cynical: Stating the obvious in *Bouie*, 378 U.S. at 355 n.5, this Court stressed that "[t]he determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective

expectations of particular defendants." Everyone, regardless of mental status, is "presumptively charged with knowledge of the law," *Atkins v. Parker*, 472 U.S. 115, 130 (1985), and this Court in *Rogers*, therefore, did not even consider whether Rogers had actually relied on the subsequently-abolished rule and, on that basis, intentionally aimed his knife in such a way that his victim would linger for more than a year and a day. If Petitioner's and the State Amici's argument had merit, a question for the trier of fact in a case presenting a diminished capacity defense would be whether the accused knew of and relied on the existence of the defense, and a jury would be instructed as to that element of the defense. There is, of course, no such element, and there was no such instruction at Respondent's first trial or at the trial of any other accused raising the defense.[28]

As this Court has often stressed, fundamental fairness is the ultimate touchstone of due process. *E.g.*, *Rogers*, 532 U.S. at 460, 462 (noting that its holding "adequately respects the due process concern with fundamental fairness and protects against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law"). On the facts of this case,

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[28] See also *Stevenson*, 331 N.W.2d at 148-49 (rejecting retroactive application of its decision abolishing Michigan's year-and-a-day rule because "[i]t would be nothing if not erratic to declare for the first time today, almost five yeas after the year and a day rule effectively barred a murder prosecution in this case, that such a prosecution could be maintained. *The defendant's subjective intent or reliance is simply not controlling in this case.*" (emphasis added)).

nothing could have been more fundamentally unfair than to apply *Carpenter* retroactively to preclude Respondent from raising the partial defense of diminished capacity at his retrial. The decision of the Michigan Court of Appeals was wholly indefensible by reference to the law that had been expressed prior to the time of his offense.

B. The Michigan Court of Appeals unreasonably applied clearly established federal law when it concluded that *Carpenter* could be applied retroactively in Respondent's case.

For all of the reasons discussed above, the State's refusal to permit Respondent to offer evidence of his diminished mental capacity at his retrial was an extreme decision that was manifestly contrary to and an unreasonable application of clearly established federal law as established by this Court, 28 U.S.C. § 2254(d)(1). It was a decision "so lacking in justification" as to be "beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-87.

While a federal court exercising habeas jurisdiction must be mindful of "AEDPA's purpose to further the principles of comity, finality, and federalism," *Williams v. Taylor*, 529 U.S. 420, 436 (2000), it must also respect Congress' mandate to provide relief where the petitioner has met his or her procedural obligations and the state court's decision under review is contrary to or an unreasonable application of clearly established federal law as determined by this Court, 28 U.S.C. § 2254(d)(1). Deference to state courts' decisions is,

therefore, limited to the state courts' reasonable decisions, a determination that takes into account whether more than one decision was objectively reasonable in the circumstances. Where, for example, the question is whether trial defense counsel rendered ineffective assistance of counsel by failing to consult experts on blood evidence where pursuing such a strategy might have backfired on the defendant, *Richter*, *supra*, or where the question is whether a trial judge abused his or her discretion in granting a mistrial, a decision as to which multiple reasonable options are often available to the trial judge, *Renico v. Lett*, 130 S. Ct. 1855, 1864 (2010), more leeway is necessarily accorded. Where only one decision would have been reasonable in the circumstances, however, less latitude is warranted, even where the question is the generally broader one of whether trial defense counsel provided ineffective assistance of counsel in recommending rejection of a plea offer. See, *e.g.*, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

Further, the degree of deference accorded a state court's decisions must be sufficiently limited to protect the primacy of the federal constitution lest "federal 'law as determined by the Supreme Court of the United States' . . . be applied by the federal courts one way in Virginia and another way in California." *Williams*, 529 U.S. at 389 (Stevens, J., plurality opinion).

The instant case epitomizes the kinds of circumstances in which habeas relief remains available and necessary. Not only was the error at issue a fundamental one that deprived Respondent of a fair trial, the state courts of Michigan have completely failed to meet their most basic obligation to him. It is

now twenty years since Respondent's offense, and he has yet to receive a fair trial at which he was allowed to present evidence in support of his only viable defense. He is also apparently the only person in Michigan charged with a specific intent crime between 1973 and 2001 who was not permitted to raise a diminished capacity defense at a fair trial.

Where, as here, the state court's decision was fundamentally unfair and clearly, objectively unreasonable, granting the writ was not only wholly consistent with Congress' mandate, it was the only possible decision compatible with this Court's clearly established federal law and fundamental notions of justice.

CONCLUSION

For all the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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ADDENDUM: MICHIGAN APPELLATE DECISIONS RECOGNIZING DIMINISHED CAPACITY DEFENSE BETWEEN ENACTMENT OF MICH. COMP. LAWS § 768.21a (1975) AND DATE OF DECISION IN *PEOPLE* v. *CARPENTER* (2001) (EXCLUSIVE OF CASES RAISING DIMINISHED CAPACITY ONLY IN RELATION TO INTOXICATION)

I. Decisions between enactment of Mich. Comp. Laws § 768.21a (1975) and date of Respondent's offense (1993)

A. Michigan Supreme Court

1. *People v. Ramsey*, 375 N.W.2d 297 (Mich. 1985)
2. *People v. Fernandez*, 398 N.W.2d 311 (Mich. 1986)
3. *People v. Beach*, 418 N.W.2d 861 (Mich. 1988)
4. *People v. Griffin*, 444 N.W.2d 139 (Mich. 1989)

B. Michigan Court of Appeals

1. *People v. Fields*, 235 N.W.2d 95 (Mich. Ct. App. 1975)
2. *People v. Hall*, 269 N.W.2d 476 (Mich. Ct. App. 1978)
3. *People v. Mangiapane*, 271 N.W.2d 240 (Mich. Ct. App. 1978)
4. *People v. Ramsey*, 280 N.W.2d 565 (Mich. Ct. App. 1979)
5. *People v. Cramer*, 293 N.W.2d 744 (Mich. Ct. App. 1980)

6. *People v. Morris*, 297 N.W.2d 623 (Mich. Ct. App. 1980)
7. *People v. Gilbert*, 300 N.W.2d 604 (Mich. Ct. App. 1980)
8. *People v. McMaster*, 306 N.W.2d 434 (Mich. Ct. App. 1981)
9. *People v. Clark*, 308 N.W.2d 180 (Mich. Ct. App. 1981)
10. *People v. Linzey*, 315 N.W.2d 550 (Mich. Ct. App. 1981)
11. *People v. Atkins*, 324 N.W.2d 38 (Mich. Ct. App. 1982)
12. *People v. Smith*, 326 N.W.2d 434 (Mich. Ct. App. 1982)
13. *People v. Fordham*, 346 N.W.2d 899 (Mich. Ct. App. 1984) (Joslyn, J., dissenting), *rev'd* 347 N.W.2d 702 (Mich. 1984) (reversed for reasons stated in dissent)
14. *People v. Parker*, 349 N.W.2d 514 (Mich. Ct. App. 1984)
15. *People v. Simonds*, 353 N.W.2d 483 (Mich. Ct. App. 1984)
16. *People v. Denton*, 360 N.W.2d 245 (Mich. Ct. App. 1984)
17. *People v. Jancar*, 363 N.W.2d 455 (Mich. Ct. App. 1985)
18. *People v. Gjidoda*, 364 N.W.2d 698 (Mich. Ct. App. 1985)
19. *People v. Jones*, 390 N.W.2d 189 (Mich. Ct. App. 1986)
20. *People v. Belanger*, 405 N.W.2d 405 (Mich. Ct. App. 1987), *vacated on other grounds*, 436 N.W.2d 667 (Mich. 1989)
21. *People v. Kvam*, 408 N.W.2d 71 (Mich. Ct. App. 1987)

22. *People v. Leighty*, 411 N.W.2d 778 (Mich. Ct. App. 1987)
23. *People v. Hedelsky*, 412 N.W.2d 746 (Mich. Ct. App. 1987)
24. *People v. Hamilton*, 415 N.W.2d 653 (Mich. Ct. App. 1987)
25. *People v. England*, 416 N.W.2d 425 (Mich. Ct. App. 1987)
26. *People v. Garfield*, 420 N.W.2d 124 (Mich. Ct. App. 1988)
27. *People v. Paris*, 420 N.W.2d 184 (Mich. Ct. App. 1988)
28. *People v. Anderson*, 421 N.W.2d 200 (Mich. Ct. App. 1988)
29. *People v. Lipps*, 421 N.W.2d 586 (Mich. Ct. App. 1988)
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REPLY BRIEF

No. 12-547

In the Supreme Court of the United States

LINDA METRISH, WARDEN, PETITIONER

v.

BURT LANCASTER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Judicial construction of a criminal statute is ordinarily given retroactive effect unless the construction is "unexpected *and* indefensible by reference to the law which has been expressed prior to the conduct in issue." *Rogers* v. *Tennessee*, 532 U.S. 451, 457 (2001) (quoting *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964)) (emphasis added). Thus, in *Bouie*, this Court struck down the South Carolina Supreme Court's construction of a statute "because it was so clearly at odds with the statute's plain language *and* had no support in prior South Carolina decisions." *Rogers*, 532 U.S. at 458 (emphasis added).

The Michigan Supreme Court's decision in *People* v. *Carpenter*, 627 N.W.2d 276 (Mich. 2001), was not indefensible. When Burt Lancaster murdered Toni King in 1993, Michigan's statutory criminal code contained a comprehensive treatment of mental capacity as a defense to criminal charges but did not mention the diminished-capacity defense. And in Michigan, the judicial branch will not recognize additional criminal defenses when the legislature has specified the defenses available. *People* v. *Reese*, 815 N.W.2d 85, 99 (Mich. 2012).

Nor was *Carpenter* unexpected. In 1993, the Michigan Supreme Court had never approved the diminished-capacity defense. And the Michigan Court of Appeals had referred to the defense in only one opinion that bound other Michigan Court of Appeals panels. (Under Michigan Court Rule 7.215(J)(1), the Court of Appeals need only follow a prior published decision issued on or after November 1, 1990.) That

decision, *People* v. *Caulley*, 494 N.W.2d 853 (Mich. Ct. App. 1992), simply assumed the defense's existence without discussion. Because even the Michigan Court of Appeals could have disavowed the defense at any time, a plain-language interpretation of the relevant statute was hardly unexpected.

That is why the Michigan Supreme Court did not consider *Carpenter* a change at all. The court did not say, for example, that it was disavowing or overruling established Michigan law. Instead, the court "declined to adopt" a defense the comprehensive statute did not mention. *Carpenter*, 627 N.W.2d at 284. And the Michigan Court of Appeals' application of *Carpenter* here is entitled to double deference: first, federal-court respect for state-court interpretations of state law, *Howlett* v. *Rose*, 496 U.S. 356, 366 (1990), and second, AEDPA's admonition that federal courts may only vacate a state conviction constituting an error "beyond any possibility of fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011).

Recognizing his inability to satisfy this heavy burden, Lancaster reframes the question altogether, as follows: "Whether retroactive abolition of a common law defense violates due process." Resp. Br. 21. But the situation here is not a post-crime, judicial abolition of a common-law defense; it is a pre-crime, legislative abolition. That distinction is essential, for it reveals Lancaster was on notice that his conduct was criminal.

The Michigan Court of Appeals did not commit an error beyond any possibility of fairminded disagreement when holding, unanimously, that *Carpenter* was neither indefensible nor unexpected. The Sixth Circuit should be reversed.

ARGUMENT

I. *Carpenter* was neither indefensible nor unexpected.

In *Bouie*, this Court reversed the South Carolina Supreme Court's retroactive application of a new construction of the state's criminal trespass statute because the construction was "clearly at odds with the statute's plain language and had no support in prior South Carolina decisions." *Rogers*, 532 U.S. at 458 (citing *Bouie*, 378 U.S. at 356). Conversely, in *Rogers*, this Court upheld the Tennessee Supreme Court's retroactive abrogation of the common-law year-and-a-day rule because the abrogated rule was an "outdated relic of the common law" that had been abolished in many jurisdictions. *Rogers*, 532 U.S. at 463–64. Significantly, the year-and-a-day rule "did not exist as part of Tennessee's statutory criminal code." *Id.* at 464.

The present case is similar to *Rogers* and the exact opposite of *Bouie*. The diminished-capacity defense does not exist as part of Michigan's statutory criminal code, and the defense is "clearly at odds with" Michigan's comprehensive mental-capacity scheme, which does not include diminished capacity in its enumerated defenses. The fact that the Michigan Supreme Court in *Carpenter* recognized this reality was neither indefensible nor unexpected.

A. *Carpenter* was not indefensible.

The Michigan Supreme Court held that the Michigan Legislature excluded the diminished-capacity defense by omitting it from a comprehensive 1975 statute articulating mental-capacity defenses:

> [T]he Legislature, by adopting a comprehensive framework concerning mental illness and retardation as it relates to criminal responsibility, has established that defendants suffering from mental deficiencies amounting to legal insanity "should be acquitted on that ground and treated for their disease. Persons with less serious mental deficiencies should be accountable for their crimes just as everyone else." [*Carpenter*, 627 N.W.2d at 284 n.9 (quoting *Chestnut* v. *State*, 538 So.2d 820, 825 (Fla. 1989)).]

The Michigan Supreme Court had sound legal and policy reasons for this statutory interpretation.

Regarding the statutory text, it has long been Michigan law that, in the absence of express language leaving open the possibility, it is not the judiciary's role to create new criminal defenses when the legislature has specified what defenses are available. For example, in *People* v. *Reese*, 815 N.W.2d 85, 99 (Mich. 2012), the court held that the doctrine of imperfect self-defense does not exist as a freestanding defense mitigating murder to voluntary manslaughter. In so holding, the court reversed *People* v. *Springer*, 298 N.W.2d 750 (Mich. Ct. App. 1980), in which the Court of Appeals purported to change Michigan common law *after* the Michigan Legislature's codification of murder and

manslaughter crimes. The Michigan Supreme Court "emphatically stated that once the Legislature codifies a common law crime and its attendant common law defenses, the criminal law of this state concerning that crime should not be tampered with except by legislation." *Reese*, 815 N.W.2d at 99 (quoting *People* v. *Riddle*, 649 N.W.2d 30 (Mich. 2002), and *In re Lamphere*, 27 N.W. 882 (1886)).[1]

Here, the Michigan Legislature "enacted a comprehensive statutory scheme setting forth the requirements for and the effects of asserting a defense based on either mental illness or retardation." *Carpenter*, 627 N.W.2d at 285. By excluding diminished capacity from this comprehensive scheme, the Michigan Legislature "signified its intent not to allow evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent." *Id.* This is far from an indefensible interpretation of the statute.

The fact that the Michigan Legislature was acting intentionally is buttressed by the fact that the 1975 enactment was not merely a codification of then-existing Michigan common law regarding mental capacity. The statute added the possibility of a jury finding a defendant "guilty but mentally ill," a result that empowered Michigan trial courts to order

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[1] See also, e.g., *United States* v. *Johnson*, 529 U.S. 53, 57–58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *Bates* v. *United States*, 522 U.S. 23, 29 (1997) (declining to read an additional element into a criminal statute).

psychiatric confinement of a duration commensurate with the sentence that could have been imposed if the defendant had been found guilty but not mentally ill. Mich. Comp. Laws § 768.36. Yet the Legislature saw no reason to add a diminished-capacity defense that had existed at common law since at least 1867 outside the United States, Pet. App. 67a (citing *State* v. *Wilcox*, 436 N.E.2d 523 (1982)), and since at least 1949 within it, see *People* v. *Wells*, 202 P.2d 53 (Cal. 1949).

The Michigan Supreme Court in *Carpenter* also recognized two significant rationales behind the legislative "policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." *Carpenter*, 627 N.W.2d at 283.

The first is the critical difference between "the subtle gradations of mental illness recognized in the psychiatric field" and the lack of such gradation in the criminal law, which "requires a final decisive moral judgment" of the accused's culpability. *Carpenter*, 627 N.W.2d at 283 (quotations omitted). Whereas "the insanity concept operates as a bright-line test separating the criminally responsible from the criminally irresponsible," the diminished-capacity defense "posits a series of rather blurry lines." *Id.*

The second is the substantial disparity in consequences for a defendant acquitted based on insanity versus diminished capacity. "Persons acquitted by reason of insanity, particularly where the facts are grave, cannot be allowed simply to walk out the front door of the courthouse." *Carpenter*, 627 N.W.2d at 283 (quotation omitted). Such offenders "may be confined and required to undergo evaluation and treatment." *Id.*

(citing Mich. Comp. Laws § 330.2050). In stark contrast, if "psychiatric testimony were generally admissible to cast a reasonable doubt upon whatever degree of *mens rea* was necessary for the charged offense," the "future safety of the offender as well as the community would be jeopardized by the possibility that one who is genuinely dangerous might obtain his complete freedom." *Id.* at 284 (quoting *Bethea* v. *United States*, 365 A.2d 64, 90–91 (D.C. 1976)).

To reiterate, however, the Michigan Supreme Court's decision did not rest its decision on these policy rationales, nor even the "wide divergence of views among the states concerning the admissibility of evidence of mental illness short of insanity." *Carpenter*, 627 N.W.2d at 282 (citation omitted). The court did not need to "join the affray" because the "Legislature, by enacting the comprehensive statutory framework . . ., has already conclusively determined when mental incapacity can serve as a basis for relieving one from criminal responsibility." *Id.* at 283.

Lancaster spends little time explaining why *Carpenter* was indefensible, arguing only that the 1975 enactment was "entirely silent as to diminished capacity." Resp. Br. 17. But that's precisely the point. By enacting a comprehensive statutory scheme for mental-capacity defenses and excluding diminished capacity, the Michigan Legislature made its choice. And the Michigan's Supreme Court's interpretation of the statute's plain language is not "incapable of being maintained as right or valid." *Merriam-Webster Online Dictionary* (defining "indefensible").[2]

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[2] http://www.merriam-webster.com/dictionary/indefensible.

B. *Carpenter* was not unexpected.

Lancaster spends the vast majority of his brief arguing that *Carpenter* was unexpected. But Lancaster's unexpectedness argument misapprehends both the applicable test and various aspects of Michigan law.

To begin, the correct test is *Carpenter*'s unexpectedness "by reference to the law which had been expressed *prior to the conduct in issue*." *Rogers*, 532 U.S. at 462 (quoting *Bouie*, 378 U.S. at 354) (emphasis added). There is no legal relevance to the authorities Lancaster cites that postdate his 1993 murder of Toni King. Resp. Br. 4, 6–14, A-3–A-9.

Next, under Michigan law, the only Michigan Court of Appeals decisions that bind subsequent appellate panels are those issued after November 1, 1990. Mich. Ct. R. 7.215(J)(1).[3] Before then, a panel did not have to follow a prior one. As noted above, the universe of published Michigan Court of Appeals decisions that postdate November 1, 1990, and predate Lancaster's 1993 murder includes only one opinion, *People* v. *Caulley*, 494 N.W.2d 853 (Mich. Ct. App. 1992). And *Caulley* simply assumed without discussion that the diminished-capacity defense existed. Because even the Court of Appeals could have disavowed the diminished-capacity doctrine at any time, it was hardly unexpected for the Michigan Supreme Court to do so.

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[3] Lancaster says that a "published decision of the Court of Appeals has precedential effect under the rule of stare decisis." Resp. Br. 7 (quoting Mich. Ct. R. 7.215(C)(2)). But he ignores that the Court of Appeals need only follow the rule of law established by decisions published "*after* November 1, 1990." Mich. Ct. Rule 7.215(J)(1) (emphasis added).

As for the Michigan Supreme Court, it made clear in *Carpenter* that it had "never specifically authorized [the diminished-capacity defense's] use in Michigan courts." 627 N.W.2d at 281. And until a "state's highest court has spoken on a particular point of state law, the law of the state necessarily must be regarded as unsettled." *Niederstadt* v. *Nixon*, 505 F.3d 832, 837 (8th Cir. 2007) (en banc). This is so because, even when a state's lower courts provide a reasonable construction of a state statute, federal courts are bound *only* by a contrary conclusion of the state's highest court. *O'Brien* v. *Skinner*, 414 U.S. 524, 531 (1974); accord *Missouri* v. *Hunter*, 459 U.S. 359, 368 (1983).

Contrary to *Carpenter*'s pronouncement, Lancaster argues that the Michigan Supreme Court accepted the diminished-capacity defense in *People* v. *Ramsey*, 375 N.W.2d 297, 304 (Mich. 1985). Resp. Br. 9–10. Not so. *Ramsey* "decline[d] to accept Ramsey's invitation to hold that a finding of mental illness negates malice aforethought as a matter of law." *Ramsey*, 375 N.W.2d at 304. Indeed, the issue was not even presented, because Ramsey possessed the requisite *mens rea*:

> The trial court in this case found that *Ramsey entertained the malice aforethought necessary to support a conviction* of second-degree murder. . . . Had the trial judge indicated a refusal to consider the defendant's malice aforethought, we would find it necessary to address the question of the extent to which mental illness could diminish the intent requirement for second-degree murder. *But he did not.* [*Id.* at 304 (emphasis added).]

The dearth of pre-1993 authority leaves Lancaster with two Hail Mary passes: Michigan jury instructions, Resp. Br. 11 n.9, and hyperbole, Resp. Br. 19 ("Re-writing history may be common in despotic regimes, but it is incompatible with fundamental notions of fairness . . . . Act III of *Rigoletto* cannot be re-written in order to save Gilda.").

As to the instructions, they are creations of the state bar, "not officially sanctioned by the Michigan Supreme Court." Pet. App. 18a. "Surely the legislature's choice not to codify diminished capacity is more significant than the state bar association's choice to include it in its publication of standard jury instructions." Pet. App. 32a (Batchelder, C.J., dissenting).

As for the hyperbole, it does not diminish the absence of pre-1993 Michigan case law specifically authorizing the diminished-capacity defense. Because the comprehensive 1975 statutory enactment said nothing about the defense, and Michigan courts were able to disavow the defense at any time, *Carpenter* could not be unexpected.[4]

Lancaster concludes his brief with an addendum containing a litany of Michigan appellate cases "*recognizing* diminished capacity defense." Resp. Br. A-1; *id.* at 4, 8–11, 30, 31 (emphasis added).

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[4] Lancaster also argues that the *Carpenter* court conceded the validity of the diminished-capacity defense through 2001 by titling a section of the opinion "The *Continued* Viability of the Diminished Capacity Defense in Michigan." Resp. Br. 13. But this heading prefaced a discussion of the defense's viability *after* the 1975 enactment. *Carpenter*, 627 N.W.2d at 283–85.

"Mentioning" would be more accurate. And of the 133 listed cases, 96 postdate Lancaster's 1993 murder of Toni King, and 32 are pre-November 1, 1990 Court of Appeals decisions that did not bind subsequent Court of Appeals panels (much less the Michigan Supreme Court).

That leaves only five cases: *Ramsey* and *Caulley* (both discussed above) plus three additional and entirely innocuous Michigan Supreme Court decisions. In *People* v. *Fernandez*, 398 N.W.2d 311, 320 (Mich. 1986), the court declined to address diminished capacity vis-à-vis voluntary intoxication because the issue was not presented. In *People* v. *Beach*, 418 N.W.2d 861 (Mich. 1988), the court made no mention of diminished capacity other than noting that defendant claimed drug-influenced diminished capacity. And in *People* v. *Griffin*, 444 N.W.2d 139, 140 (Mich. 1989), the court issued a three-paragraph summary order remanding so the trial court could consider whether counsel was ineffective for failing to explore defenses of diminished capacity and insanity. As Chief Judge Batchelder explained in her dissent, this "reemphasizes only the point that the defense was available. It does not indicate that the defense was so well established that its elimination was unexpected." Pet. App. 33a (Batchelder, C.J., dissenting).

The addendum fails even when giving closer consideration to pre-1993 Court of Appeals decisions that could be changed at any time. For example, *People* v. *Managiapane*, 271 N.W.2d 240, 247–49 (Mich. Ct. App. 1978), does not represent an unequivocal recognition of the diminished-capacity defense as Lancaster asserts. Resp. Br. 8 & n.6. The court there

said that while the "categories of the mentally retarded, as defined in the statute, and of those with diminished capacity have striking similarities," the court was "*not* prepared to say they are identical." *Id.* at 247 (emphasis added). Thus, *assuming* "mentally retarded" is equivalent to "diminished capacity," a defendant claiming diminished capacity must give notice of the defense because the 1975 statutory scheme requires all mental-capacity claims to be properly noticed. *Id.* at 249.

The diminished-capacity defense's tenuous status is corroborated further by the fact that Michigan courts conflated insanity, diminished capacity, and mental illness by using the phrases interchangeably. *People* v. *Smith*, 326 N.W.2d 434, 436–37 (Mich. Ct. App. 1982). One Court of Appeals panel even said that "[i]t is irrelevant whether . . . [it] is labeled as insanity, diminished capacity, or some other name." *People* v. *Adkins*, 324 N.W.2d 38, 41 (Mich. Ct. App. 1982).

In sum, while it is "indisputable that defendants were able to raise the [diminished-capacity] defense prior to *Carpenter*," "the availability of the defense alone does not make its elimination unexpected." Pet. App. 32a (Batchelder, C.J., dissenting). In *Rogers*, for example, the year-and-a-day rule had been available for nearly a century, but this Court still approved its retroactive elimination based on all the circumstances, which showed the change to be neither indefensible nor unexpected. The same is true here. For similar reasons, "the Michigan Court of Appeals's adjudication of Lancaster's due process claim was consistent with Supreme Court precedent." Pet. App. 35a (Batchelder, C.J., dissenting).

II. The Michigan Court of Appeals' ruling below satisfies AEDPA.

When it comes to AEDPA, Lancaster's burden is even higher. To prevail, he must show not only that the Michigan Court of Appeals below was wrong when it concluded that *Lancaster* was neither indefensible nor unexpected, he must demonstrate that the Court of Appeals' error was "so well understood and comprehended in existing law" that the court's unanimous decision was "beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011). Or, to put it another way, Lancaster must show that the Michigan Court of Appeals' application of federal law was objectively unreasonable. *Wiggins* v. *Smith*, 539 U.S. 510, 520–21 (2003). And he must make that showing relying only on the clearly established precedent of this Court. 28 U.S.C. § 2254(d)(1).

As the warden explained in her initial brief, Pet. Br. 26–28, an unreasonable application of federal law is very different from an incorrect application of federal law. And it is very difficult to characterize the Michigan Court of Appeals' unanimous opinion as "objectively unreasonable," *Wiggins*, 539 U.S. at 520–21, or "beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 786–87. "[U]sing federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts" is precisely what AEDPA prohibits. *Parker* v. *Matthews*, 132 S. Ct. 2148, 2149 (2012) (per curiam) (quoting *Renico* v. *Lett*, 130 S. Ct. 1855, 1866 (2010)).

Lancaster's contention is that the Michigan Court of Appeals' analysis was manifestly contrary to this Court's decisions in *Bouie* and *Rogers*. Resp. Br. 24–38. Not so. In *Bouie*, the South Carolina Supreme Court engaged in an "unforseseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie*, 378 U.S. at 352. The result was a conviction for conduct "not enumerated in the statute" at the time of the defendants' conduct. *Id.* at 363 (quotation omitted). In contrast here, the Michigan Supreme Court *applied* the relevant statutory language in accord with long-held Michigan principles of statutory interpretation.

As for *Rogers*, the Tennessee Supreme Court expressly admitted that it was changing the law by abolishing a century-old common-law rule. *Rogers*, 532 U.S. at 455. Here, the Michigan Supreme Court said that it was not changing the law, but simply applying the plain language of the 1975 mental-capacity statute. *Rogers* also involved a state court's change in the common law after the underlying crime had already been committed. *Id.* In contrast, the change in law here was the result of a pre-crime legislative enactment. And the Tennessee Supreme Court said that the year-and-a-day rule was truly established in Tennessee, a "reasonable reading of state law by the State's highest court [that] is binding on this Court." *Id.* at 468–69 (Scalia, J., dissenting); see also *id.* at 480 ("the Supreme Court of Tennessee is the authoritative expositor of Tennessee law, and has said categorically that the year-and-a-day rule was the law") (Scalia, J., dissenting). The Michigan Supreme Court said the exact opposite here. *Carpenter*, 627 N.W.2d at 284 (declining "to adopt" the defense).

Where the posture of this case is better than the best U.S. Supreme Court precedents that Lancaster can muster, it is not possible to say that the Michigan Court of Appeals' decision was manifestly contrary to such precedents. Emphasizing the point, another Michigan Court of Appeals panel—composed of entirely different judges than the panel that decided the present case—reached the exact same conclusion as the court here in an opinion that issued shortly after the *Carpenter* decision. *People* v. *Talton*, No. 231986, 2002 WL 1375894, at *3–5 (Mich. Ct. App. June 25, 2002). Citing *Bouie*, the court held that "retroactive application of *Carpenter* . . . does not violate the Ex Post Facto Clauses of the state and federal constitutions or implicate due process concerns." *Id.* at *4. "[T]he *Carpenter* Court addressed a question of statutory interpretation that had neither been previously decided at that level, nor, for that matter, in the Court of Appeals cases cited therein which, in other contexts, recognized the diminished capacity defense." *Id.* (citations omitted).

It is one thing to fault the Michigan Court of Appeals for failing to address an issue that was never squarely presented to them, as was the case with the diminished-capacity defense. It is quite another to say the court was objectively unreasonable in concluding that the Michigan Supreme Court's plain-language interpretation was neither indefensible nor unexpected.

This Court should reverse.

III. Lancaster's other arguments lack merit.

Lancaster's remaining points can be disposed in summary fashion.

First, Lancaster says that before 2001, appellate-court decisions do not reflect that any prosecutor argued on appeal that the 1975 insanity statute abolished diminished capacity as a defense, and it was at the Michigan Supreme Court's request in *Carpenter* that the parties addressed it. Resp. Br. 17–18. But that observation has no bearing on the question whether the decision was unexpected and indefensible. A court will entertain an issue when there is a case that presents a proper vehicle to address it. The Michigan Supreme Court determined that *Carpenter* was the proper vehicle to address the relationship between the 1975 insanity statute and the so-called diminished-capacity defense. Whether Michigan courts should have entertained the question previously, if at all, is exclusively a matter of state law. See *Virginia* v. *Hicks*, 539 U.S. 113, 120 (2003).

Second, Lancaster says that *Carpenter* is distinguishable from *Rogers* because the Michigan Supreme Court did not address the issue of retroactivity. Resp. Br. at 32. While it is true that the Michigan Supreme Court did not specifically provide a retroactivity holding, the court did express its view that it was not breaking new ground. The court said that it "need not join the affray" involving the diminished-capacity defense's propriety because the Legislature, "by enacting the comprehensive statutory framework . . ., has *already*" rejected the defense. The court was merely "*declin[ing] to adopt*" the defense.

Carpenter, 627 N.W.2d at 282, 284. As a result, *Carpenter* declared the law as the Michigan Legislature had enacted it some 26 years earlier. *People* v. *Doyle*, 545 N.W.2d 627, 636 (Mich. 1996).

Third, Lancaster says that the circumstances here are not fair because, if the Michigan Court of Appeals had correctly decided his *Batson* claim following his first trial, he would have been able to raise his previously unsuccessful diminished-capacity defense during his retrial. Resp. Br. 34. But the vagaries of litigation sometimes result in windfalls, and sometimes result in disadvantages. When this Court announces a new rule of criminal procedure that does not apply retroactively, defendants whose cases are not yet final due to slow-moving state processes receive the benefit of the new rule. Defendants whose cases are final due to efficient state adjudication are left out. Such disparities have never constituted a due-process violation.

Fourth, Lancaster conflates the idea that evidence can be used to negate *mens rea* and the idea of diminished capacity. Resp. Br. 28–29. But the warden cited the Sixth Circuit dissenting opinion for the proposition that diminished capacity as a defense "had been receding in state jurisprudence long before Lancaster's trials" and that "[s]ome state legislatures wrote the defense out of their state laws, while in other jurisdictions, the state courts held that their case law did not support such a defense." Pet. Br. 24–25. This is true because even when a state allows evidence of mental illness to be presented to negate *mens rea*, (i.e., insanity), it does not follow that the state recognizes

diminished capacity as a defense to escape criminal culpability.

Thus, the warden correctly indicated that some states wrote the diminished-capacity defense out of their law books. See *Barnett* v. *Alabama*, 540 So. 2d 810, 812 (Ala. Crim. App. 1988); *Kansas* v. *Pennington*, 132 P.3d 902, 908 (Kan. 2006). And the warden also correctly indicated that numerous other states had determined that their case law did not support a diminished-capacity defense. See Cal. Penal Code § 25(a); *Mincey* v. *Head*, 206 F.3d 1106, 1139 (11th Cir. 2000); *Arizona* v. *Laffoon*, 610 P.2d 1045, 1047 (Ariz. 1980); *O'Brien* v. *United States*, 962 A.2d 282, 300–01 (D.C. 2008); *Hodges* v. *Florida*, 885 So. 2d 338, 352 n.8 (Fla. 2003); *Hawaii* v. *Klafta*, 831 P.2d 512 (Haw. 1992); *Cardine* v. *Indiana*, 475 N.E.2d 696, 698 (Ind. 1985); *Iowa* v. *Plowman*, 386 N.W.2d 546, 548 (Iowa Ct. App. 1986); *Louisiana* v. *Thompson*, 665 So. 2d 643, 647 (La. Ct. App. 1995); *Maryland* v. *Greco*, 24 A.3d 135, 144 (Md. Ct. Spec. App. 2011); *Massachusetts* v. *Finstein*, 687 N.E.2d 638, 640 (Mass. 1997); *Cuypers* v. *Minnesota*, 711 N.W.2d 100, 105 (Minn. 2006); *Stevens* v. *Mississippi*, 806 So. 2d 1031, 1051 (Miss. 2001); *North Carolina* v. *Adams*, 354 S.E.2d 338, 343 (N.C. Ct. App. 1987); *Ohio* v. *Wilcox*, 436 N.E.2d 523, 533 (Ohio 1981); *South Carolina* v. *Santiago*, 634 S.E.2d 23, 28 (S.C. Ct. App. 2006); *Tennessee* v. *Gosse*, 982 S.W.2d 349, 353 (Tenn. Crim. App. 1997); *Davis* v. *Texas*, 313 S.W.3d 317, 328 (Tex. Crim. App. 2010); *Keats* v. *Wyoming*, 115 P.3d 1110, 1119 (Wyo. 2005).

These cases establish that diminished capacity is disfavored nationally. Lancaster's contrary claim is belied by these authorities.

Finally, Lancaster relies on medical-science advances as a justification for perpetuation of the diminished-capacity defense. Resp. Br. 26. While such advances may make it easier for psychologists to distinguish the fine gradations of an individual's mental capacity, they do not change the fact that blurry mental-capacity lines are incompatible with the "decisive moral judgment" that criminal law requires. *Carpenter*, 627 N.W.2d at 283. Nor do they fix the problem of allowing dangerous murderers like Lancaster to roam free in the community. *Id.* at 283–84.

In other words, Lancaster may disagree with the Michigan Legislature's policy decision to eliminate the diminished-capacity defense, but that is not a valid ground to set aside Lancaster's murder conviction. Nor does that disagreement show that it was unreasonable to apply the plain meaning of the 1975 enactment to Lancaster's 1993 crime.

* * *

Lancaster received a windfall when the trial court allowed him to assert an ultimately unsuccessful diminished-capacity defense in his first trial. But that windfall does not create an entitlement to a continuing misapplication of Michigan's criminal code for his second trial. The Michigan Court of Appeals' conclusion that *Carpenter* is neither indefensible nor unexpected is not so unreasonable as to be beyond any possibility for fairminded disagreement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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IN THE
Supreme Court of the United States

LINDA METRISH, Warden,

Petitioner,

v.

BURT LANCASTER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, ARIZONA, COLORADO, IDAHO, ILLINOIS, IOWA, KANSAS, KENTUCKY, MONTANA, NEW MEXICO, SOUTH CAROLINA, UTAH, WASHINGTON AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the Michigan Supreme Court's recognition that a state statute had abolished the long-maligned diminished-capacity defense was an "unexpected and indefensible" change in a common law doctrine of criminal law under this Court's retroactivity jurisprudence. *See Rogers v. Tennessee*, 532 U.S. 451 (2001).

2. Whether the Michigan Court of Appeals' rejection of Lancaster's due-process claim was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" so as to justify habeas relief. *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011).

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INTEREST OF THE *AMICI* STATES

The *amici* States hae a compelling interest in ensuring that federal courts uphold criminal convictions absent state court rulings that are "contrary to or an unreasonable application of" the Court's precedents. They also have a more specific interest in defending their own courts' determinations of state law against federal court interference. Furthermore, as sovereign operators of the nation's front-line criminal justice systems, states have a compelling interest in maintaining flexibility in developing substantive criminal law standards, consistent with due process and other Constitutional protections.

The decision below contravenes these interests. The Sixth Circuit overrode the Michigan judiciary's retroactive application of its conclusion that the legislature had eliminated diminished capacity as a defense to premeditated murder. For purposes of applying the Court's due process retroactivity precedents, however, there is a logical disconnection between a criminal defendant's asserted "diminished capacity" to form the specific intent necessary for premeditated murder, and the interests of "fair notice" that underlie the due process rule applied below. Furthermore, it is not clear how the Michigan courts could have unreasonably applied *this* Court's precedents when interpreting *state law* to support retroactive application of the diminished capacity defense rule.

SUMMARY OF THE ARGUMENT

The decision below invalidated the premeditated murder conviction of Burt Lancaster because he lacked "fair warning" before he killed his girlfriend that his supposed "diminished capacity" would not be a defense to prosecution. According to the Sixth Circuit, refusing to permit Lancaster to assert a diminished capacity defense that supposedly existed when he murdered Toni King burdened his right to due process, which "turns upon . . . the *appearance to the individual* of the status of state law as of that moment [when the crime was allegedly committed]." Pet. App. at 6a-7a (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (emphasis added)). The Sixth Circuit did not address whether, if such "fair warning" could possibly have impacted Lancaster's decision to kill King, he could nonetheless plausibly have suffered from the diminished mental capacity he asserted at trial.

On a basic level, it makes no sense to apply the *Bouie* foreseeability test to a diminished capacity defense. Fair warning can be important in situations involving, for example, claims of self-defense, where a defendant might actually have relied on knowledge of the law when deciding whether to use deadly force. But where, as is true here, such cognitive reliance would itself render the defense (lack of sufficient cognition) wholly inapplicable, there can be no due process concern.

Furthermore, the Sixth Circuit did not give the Michigan courts proper deference under AEDPA. Retroactivity is a matter of interpreting state law and is not subject to federal habeas review.

ARGUMENT

I. Retroactive Elimination of a "Diminished Capacity" Defense Cannot Be an "Unreasonable Application" of "Fair Warning" Due Process Precedents

The due process right vindicated by *Bouie* and *Rogers* is "[t]he basic principle that a criminal statute must give *fair warning* of the conduct that it makes a crime . . . ." *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964) (emphasis added); *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) (explaining that *Bouie*'s "rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning"). "Courts are concerned about notice, forseeability, and fair warning because it is expected that both statutes and judicial interpretations of those statutes affect the behavior of the public. . . . If, however, the change in question would not have had an effect on anyone's behavior, notice concerns are minimized." *United States v. Barton*, 455 F.3d 649, 654-55 (6th Cir. 2006).

In the context of a diminished capacity defense, the *Bouie* standard makes little sense. If Burt Lancaster had truly suffered from diminished

capacity at the time he killed Toni King, he would not have had the mental capacity to foresee that he could rely on the defense at trial. The diminished capacity defense "allows a defendant, even though legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime." *People v. Carpenter*, 627 N.W.2d 276, 280 (Mich. 2001). A person who does not possess the mental capacity necessary for premeditation of murder cannot have the mental capacity to forecast whether that incapacity may be a defense to prosecution. Yet the decision below premised its decision on precisely that fantastical conceit. Pet. App. at 23a ("Lancaster could not have reasonably foreseen in 1993—when his crime was committed—that the consistent line of Michigan Court of Appeals' decisions upholding the diminished-capacity defense would have been overturned before his retrial in 2005."). The specific circumstance of a diminished capacity defense consequently eliminates the primary rationale—to require "fair warning"—for applying *Bouie*.

1. For most traditional affirmative defenses, such as self-defense and coercion, it makes sense that criminal defendants might plausibly consider the availability of the defense when choosing to engage in the conduct the state nonetheless charges as a crime. For example, if "Jane Doe chooses to kill John Smith when he threatens her with substantial bodily harm or death[,] Doe has a right to rely on the representation of her state legislature that her

conduct is legal. If the State then were to . . . not permit her to plead self-defense, [that denial] undoubtedly would violate principles of fundamental fairness." *Gilmore v. Taylor*, 508 U.S. 333, 359 (1993) (Blackmun, J., dissenting). Similarly, a defendant compelled to abet a murder must be able to invoke that defense if the law at the time did not give notice that the defense was unavailable. *United States ex rel. Reed v. Lane*, 759 F.2d 618, 623-24 (7th Cir. 1985).

The nature of the defenses at issue in *Gilmore* and *Reed* did not inherently negate the defendant's capacity to consider the law. Thus, even if the defendants had not actually studied state criminal statutes and court decisions before committing the crime, it makes sense in those cases to presume that they knew (and relied upon) the law. *See Atkins v. Parker*, 472 U.S. 115, 130 (1985).

Indeed, defendants legitimately benefit from the "fair notice" standard when it applies to retroactive judicial negation of many defenses listed in the Model Penal Code. Accused criminals might feasibly be deterred from illegal conduct in at least some cases by fair notice that the judiciary may be poised to eliminate the following MPC defenses:

- intoxication (MPC § 2.08)
- duress (MPC § 2.09)[1]
- military order (MPC § 2.10)
- consent (MPC § 2.11)
- de minimis infraction (MPC § 2.12)
- entrapment (MPC § 2.13)
- defense of self (MPC § 3.04)[2]
- defense of others (MPC §§ 3.05, 3.08)
- defense of property (MPC § 3.06)
- effectuation of arrest (MPC § 3.07)
- prevention of escape (MPC § 3.07)
- prevention of crime (MPC § 3.07)

Accordingly, as a general matter the Court's "fair notice" standard sensibly applies to most cases where courts retroactively vitiate affirmative defenses.

2. With a few MPC defenses, however, a defendant who commits a crime based on assumptions about the defense could not plausibly make use of the defense, so "fair notice" about judicial elimination should not be relevant. This category includes factual ignorance or mistake (MPC § 2.04) and insanity (MPC § 4.01), and may also include most cases of assisting an unlawful arrest

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[1] *See Reed*, 759 F.2d at 623-24 (holding that fair warning was the proper standard for retroactive vitiation of the coercion/duress defense).

[2] *See Gilmore*, 508 U.S. at 359 (Blackmun, J., dissenting) (observing that fair warning should be the proper standard for retroactive vitiation of the ability to assert self-defense).

(MPC § 3.07) and entrapment (MPC § 2.13). All presuppose action predicated on a lack of awareness of some sort (whether merely of a particular fact or more generally). Postulating that a criminal defendant would act based on the availability of the defense negates the lack-of-awareness predicate.

Accordingly, this Court and lower courts have distinguished situations where *Bouie* is inapplicable because notice is unwarranted or unhelpful. In *Bradshaw v. Richey*, 546 U.S. 74, 74-75 (2005) (per curiam), the defendant committed arson in an attempt to kill his former girlfriend and her new boyfriend, but only a neighbor's daughter died in the fire. The Court upheld the conviction for aggravated felony murder on a theory of transferred intent against a *Bouie* due process claim in part because "[i]t is doubtful whether this principle of fair notice has any application to a case of transferred intent, where the defendant's *contemplated* conduct was *exactly* what the relevant statute [*sic*] forbade[.]" *Id.* at 76-77 (citation omitted).

The Ninth Circuit has similarly demarcated a zone where "[a]pplying *Bouie* [] would not further the principle underlying that decision" in *Gonzalez v. Wong*, 667 F.3d 965, 997 (9th Cir. 2011). There, the court rejected a murder defendant's claim that he lacked "fair notice" that, notwithstanding the invalidity of the search warrant the police officer was attempting to serve when murdered, a trial court would instruct jurors to infer that the officer

was engaged in the "lawful pursuit of his duties." *Id.* at 971-73. The court dismissed as irrelevant the question whether the defendant had "fair notice" such an instruction would be given under those circumstances because "[a]n individual who sees an officer serving a warrant would not ordinarily know at the time that the warrant was not valid." *Id.* at 997; *see also United States v. Barton*, 455 F.3d 649, 656 (6th Cir. 2006) (refusing to invalidate retroactive application of *United States v. Booker*, 543 U.S. 220 (2005), to justify an upward sentencing departure because "[f]or this court to find that notice is a significant concern in this situation, it would have to find that a defendant would likely have changed his or her conduct because of a possible increase in jail time").

Diminished capacity falls into this category. A defendant who actually suffers from diminished capacity could never benefit from "fair warning" that the defense may be unavailable. A person with mental capacity so diminished that he cannot premeditate the murder he commits could not possibly benefit from notice that his condition is not a defense. Such a person is by definition out of mental control, and due process does not require courts to afford a criminal defendant the benefit of a hypothetical mental state at war with the defendant's own contentions. It is, therefore, logical to differentiate between mentally competent defendants and persons with diminished capacity when applying the *Bouie* test. *See* Model Penal Code

§ 4.01 cmt. at 185 (1985) ("human experience teaches . . . that those who are clearly not responsible should [not] be categorized in the same way as those who clearly are").

3. At the very least, it was surely reasonable in light of this Court's precedents—not only *Bouie* and *Rogers*, but also *Bradshaw*—for the Michigan Court of Appeals to eschew an understanding of due process that allows Lancaster to prove insufficient mental capacity to commit premeditated murder on the assumption that he was perfectly lucid when he killed his victim.

Even setting aside the unlikely scenario where a *compos mentis* Burt Lancaster methodically appraises the legal landscape before deciding to kill Toni King, the supposition that an addled Lancaster might have done so, and decided to proceed only once he read the teachings of the Michigan appellate courts on diminished capacity, is farcical. *But see* Pet. App. at 23a (focusing on whether Lancaster could have "reasonably foreseen" when he committed his crime that there would be no diminished capacity defense available at his trial). Not only that, but even indulging in this thought experiment—which is necessary for Lancaster to prevail on his due process claim—could only confirm that Lancaster acted with *exactly* the calculation and premeditation he was convicted of having.

In no event were Lancaster's due process rights violated by the retroactive application of Michigan's *Carpenter* decision. The Court should rule in favor of Petitioner either because the *Bouie* foreseeability test does not apply in cases involving the rejection of a diminished capacity defense, or because, given the Court's holding in *Bradshaw* that lack of prejudice from retroactivity counts, it was not clearly established that *Bouie* should apply here. For if it was not clearly established that *Bouie* should even apply, the Michigan Court of Appeals cannot be faulted for (allegedly) applying it incorrectly.

II. In the Alternative, the Court Should Hold that Under AEDPA, Federal Courts May Not Decide that State Court Elimination of an Affirmative Defense Was "Unexpected and Indefensible" in Light of State Precedent

A. Michigan's courts based their holdings on *state* law, and federal courts should defer to such state court analysis

The decision below finds that the determination whether the elimination of a state criminal defense was foreseeable under state law is a *federal* law question. *See* Pet. App. at 23a-25a. Even assuming that Lancaster may generally maintain a *Bouie* claim pertaining to the elimination of a diminished capacity defense, however, the Court should rule that federal courts may not second-guess a state

court evaluation of the predictability of its criminal law doctrine.

Here, the Michigan Court of Appeals held that the Michigan Supreme Court's holding in *Carpenter* that the defense of "diminished capacity" did not exist was not a change in the law precluding retroactivity. Pet. App. at 76a-77a. Rather than defer to this seeming state law determination, however, the Sixth Circuit analyzed the state court cases and found that "the district court materially understated the 'foothold' that the diminished-capacity defense had established in Michigan law and failed to recognize the plethora of state appellate court cases recognizing the validity of the defense." Pet. App. at 8a.

In dissent, Chief Judge Batchelder stated that "[i]n concluding that *Carpenter* did not constitute a change in Michigan law, the [Michigan] court of appeals applied Michigan state law; it did not apply *Bouie*, *Rogers*, or any other Supreme Court precedent." Pet. App. at 30a (Batchelder, C.J., dissenting). Thus, said the Chief Judge, even if the Michigan court's decision were somehow "illogical," such a conclusion "is not relevant to our review because it was based on state, not federal, law." Pet. App. at 30a-31a. The Michigan Court of Appeals' decision, therefore, should have been given "the benefit of the doubt required under AEDPA's highly deferential standard[.]" Pet. App. at 30a.

Historically, this Court has deferred to state courts on matters of state law. *See, e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684, 691 & n.11 (1975) ("[t]his Court . . . repeatedly has held that state courts are the ultimate expositors of state law . . . and that we are bound by their constructions except in extreme circumstances," such as when such a construction "appears to be an obvious subterfuge to evade consideration of a federal issue") (internal citation and quotations omitted); *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) ("it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts").

Regarding habeas cases, the Court has stated that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Indeed, the Court has "repeatedly held that federal habeas corpus relief does not lie for errors of state law." *Wilson v. Corcoran*, 131 S. Ct. 13, 16 (2010) (citation and internal quotations omitted); *see also Pulley v. Harris*, 465 U.S. 37, 41 (1984) (holding that "[a] federal court may not issue the writ on the basis of a perceived error of state law"). Instead, "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Accordingly, where a question of state substantive law is "either the only one[ ] raised by a petitioner or

[is] in [itself] dispositive of his case," the Court has held that federal habeas review is "effectively barred." *Wainwright*, 433 U.S. at 81.

In *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (per curiam), the Court relied on a state court assessment of the retroactive application of an intervening decision to conclude that due process was not at issue. Fiore was convicted of operating a hazardous waste facility without a necessary permit. After he was convicted, the state supreme court decided a case making it clear that Fiore had not violated the relevant statute. This Court "granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Id.* at 226. The Court "asked the Pennsylvania Supreme Court whether its decision interpreting the statute not to apply to conduct like Fiore's was a new interpretation, or whether it was, instead, a correct statement of the law when Fiore's conviction became final." *Id.* The Pennsylvania Supreme Court responded that the intervening case had "merely clarified" the statute and was not new law. *Id.* at 228. The Court accepted this assessment and found that the "case presents no issue of retroactivity." *Id.*

Thus, threshold retroactivity determinations are based on how to apply state law doctrine. In *Fiore*, the question was whether, under state law, the intervening decision actually represented a new rule,

or whether it was instead simply a "clarification" of an old rule. *Id.* Here, similarly, the threshold question was whether the intervening decision represents a departure from precedent or merely clarifies extant principles. *See* Pet. App. at 8a.

And while it may seem unexceptional in the abstract for federal due process doctrine to defer to state court *refusals* to apply intervening decisions retroactively, AEDPA deference to state court resolutions of threshold state law questions should be the same regardless of the outcome. AEDPA requires deference to state courts in order to promote the goals of "comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). More generally, "[f]ederal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts." *Id.*; *see also, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus"); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) ("the doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments").

In order to advance the principles of comity, finality, and federalism, the Court should afford the Michigan courts the same deference concerning their state-law decisions here that it afforded the Pennsylvania courts in *Fiore*.

B. The availability of a diminished capacity defense in particular is a state law issue

The Court has made it clear that state criminal law and procedure rules are "not subject to proscription under the Due Process Clause" unless they "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (internal quotations omitted); *see also, e.g.*, *Montana v. Egelhoff*, 518 U.S. 37, 42, 51 (1996) (explaining that "not every widespread experiment with a procedural rule favorable to criminal defendants establishes a fundamental principle of justice" and that "the proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible").

1. The ability to plead a diminished capacity defense is *not* a fundamental principle of justice. It is, instead, a recent legal concept of uncertain legitimacy. Indeed, the Court has previously observed that the availability *vel non* of a diminished capacity defense is particularly a question of *local*

law. *See Fisher v. United States*, 328 U.S. 463, 473 (1946) (affirming under District of Columbia law that "an accused in a criminal trial is not entitled to an instruction based upon evidence of mental weakness, short of legal insanity, which would reduce his crime from first to second degree murder"). "Diminished capacity" is a case-specific defense that "allows a defendant, even though legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a *particular* crime." *Carpenter*, 627 N.W.2d at 280 (emphasis added). The diminished capacity defense represents such "a radical departure from common law concepts" that it could only be "a matter peculiarly of local concern." *Fisher*, 328 U.S. at 476; *see also Powell v. Texas*, 392 U.S. 514, 536 (1968) (questions relating to the mental state necessary to be guilty of a crime have "always been thought to be the province of the States."); *Clark v. Arizona*, 548 U.S. 735, 779 (2006) (holding that the availability of a diminished capacity defense is a matter of state prerogative, not federal constitutional law).

In contrast, insanity *is* a venerable and enduring defense. *See generally Clark*, 548 U.S. at 749-53 (acknowledging American jurisprudence's adoption of an insanity defense test over two centuries ago and the survival of the insanity defense in forty-six states); Daniel N. Robinson, *Wild Beasts & Idle Humours: The Insanity Defense from Antiquity to the Present* 8, 43, 56, 163, 193, 200-01 (Harvard University Press 1996) (tracing the history of the

insanity defense from the *Iliad* to Roman civil law to the writings of St. Augustine to the trial of Daniel McNaughtan in 1843 to *Durham v. United States* decided in 1954 to modern Supreme Court decisions). The insanity defense has general application, no matter the particular elements of a crime. *See United States v. Scott*, 437 U.S. 82, 97-98 (1978) ("The defense of insanity . . . arises from the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, where other facts established to the satisfaction of the trier of fact provide a legally adequate justification for otherwise criminal acts.") (internal quotations and citation omitted).

2. While many states have allowed diminished capacity defenses at some point, the trend now, as demonstrated by California, is to eliminate the defense. *See* Pet. App. at 33a. California was the first state to recognize the diminished capacity defense in *People v. Wells*, 202 P.2d 53 (Cal. 1949). The *Wells* court stated that there were "states of mind, other than insanity, which render a person incapable of crime in the commission of an overt act while in such mental state[.]" *Id.* at 64. Then, in *People v. Gorshen*, the California Supreme Court upheld a trial court's use of psychiatric testimony to reduce a defendant's sentence from capital to second degree murder because "it was evidence of defendant's mental infirmity short of insanity that tended to prove the defendant did not have the

necessary specific mental state to commit first degree murder." *People v. Saille*, 820 P.2d 588, 591 (Cal. 1991) (discussing *Gorshen*).

California eliminated the diminished capacity defense 30 years later because of public outrage following the "Twinkie Defense" in *People v. White*, 172 Cal. Rptr. 612 (Cal. Ct. App. 1981), which arose from the murder of San Francisco mayor George Moscone and city supervisor Harvey Milk. At trial, psychiatric experts testified that defendant "lacked the capacity to deliberate," *id.* at 615, based at least in part on depression worsened by eating too much junk food such as Twinkies and Coke. Robert Lindsey, *Dan White, Killer of San Francisco Mayor, A Suicide*, N.Y. Times, Oct. 22, 1985, http://www.nytimes.com/1985/10/22/us/dan-white-killer-of-san-francisco-mayor-a-suicide.html. The jury found White guilty of two counts of voluntary manslaughter, which precipitated rioting because "[t]he punishment so poorly matched the brutal killings that most San Franciscans believed White got away with murder." John Geluardi, *Dan White's Motive More About Betrayal than Homophobia*, SF Weekly News, Jan. 30, 2008, http://www.sfweekly.com/2008-01-30/news/white-in-milk/.

In 1982, California voters approved a Victims' Bill of Rights, which, among other things, "prohibited the use of evidence concerning a defendant's intoxication, trauma, mental illness, disease, or defect for the purpose of proving or

contesting whether a defendant had a certain state of mind in connection with the commission of a crime." Ballotpedia, Califonia Proposition 8, Victims' Bill of Rights (June 1982), http://ballotpedia.org/wiki/index.php/California_Proposition_8,_Victims%27_Bill_of_Rights_(June_1982). Later, in *People v. Saille*, 820 P.2d at 593, the Supreme Court of California confirmed that 1982's Proposition 8 had eliminated the diminished capacity defense in California.

3. The point is that, while some defenses have roots in the common law and are therefore culturally understood to be available in the vast majority of states, the defense of diminished capacity is a state-specific defense. Pet. App. at 33a. The Model Penal Code's treatment of the diminished capacity defense underscores this point. First, the MPC does not even accord the defense a specific name, but rather treats it as species of insanity. Model Penal Code § 4.02. Second, the MPC conspicuously acknowledges that its inclusion of a version of the diminished capacity defense "was designed to resolve an issue as to which there was and is a division of authority. Some jurisdictions decline to accord to evidence of mental disease or defect an admissibility coextensive with its relevance to prove or disprove a material state of mind." Model Penal Code § 4.02 cmt. at 217-18 (1985). The MPC conceded that while "[s]ome states with recent revisions have adopted the principle of [Section 4.02] . . . most do not address the issue." *Id.* at 220.

In short, as a defense to criminal prosecution, diminished capacity does not possess the renown and longevity essential for its denial amidst murky state law precedent to offend the due process principle of "fair warning." As a consequence, a state court determination that it was foreseeable that the State would reject a diminished capacity defense warrants all the more deference.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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Dated: March 11, 2013

AMICUS CURIAE BRIEF

No. 12-547

IN THE

Supreme Court of the United States

LINDA METRISH, WARDEN,

Petitioner,

v.

BURT LANCASTER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Amicus curiae is the National Association of Criminal Defense Lawyers ("NACDL").[1]

NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

In furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association frequently appears as *amicus curiae* in cases involving defendants' due process rights, speaking to the importance of ensuring defendants receive the notice and assistance they need consistent with the Constitution's guarantee of due process for all persons. As relates to the issues before the Court in this case, NACDL has an interest in protecting defendants' right to fair warning of the laws with which

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received timely notice of *amicus curiae's* intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

they may be charged and the defenses they may raise.

SUMMARY OF THE ARGUMENT

Michigan attempts to rewrite this Court's decision in *Rogers* v. *Tennessee*, 532 U.S. 451 (2001), in a way that disregards the way parties litigate criminal prosecutions in the real world and that undermines significant, and very real, reliance interests on the part of *both* prosecutors and criminal defendants. First, Michigan implausibly assumes that prosecutors and defense counsel plan plea negotiations and trial strategy based on prognostications of how the law might "develop" in the coming years rather than in reliance on the facts and law actually at hand.

Second, Michigan—and the states *amici*—ask the Court to adopt a rule authorizing retroactive application of changes to substantive law based, not on the foreseeability of the change, but on the defendant's subjective state of mind. By inviting the Court to divorce retroactivity analysis from foreseeability and sanction retroactive application of even unexpected changes, Michigan and the states *amici* ignore that prosecutors and defendants alike must be able to rely on the current state of the law in making charging decisions, negotiating pleas, and planning for trial. Both sides' ability to strategize and to advocate their clients' interests will be undercut if they must always look over their shoulder, wondering whether unforeseeable changes to current law might add, alter, or eliminate applicable defenses.

ARGUMENT

PROSECUTORS AND DEFENDANTS MUST BE ABLE TO RELY ON THE PRESENT STATE OF SUBSTANTIVE LAW IN THEIR DECISION-MAKING PROCESSES.

Retroactive changes in substantive law that violate the "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning," are unconstitutional. *Rogers* v. *Tennessee*, 532 U.S. 451, 459 (2001). Michigan argues that the *Rogers* test is not satisfied here because of the nature of the diminished capacity defense. Pet. Br. 26 ("The very nature of the defense (lack of mental capacity) precludes such reliance."). Specifically, Michigan posits that "it would border on the absurd to argue that a person would refrain from committing crimes or conduct his trial differently if he had known that a mental-capacity defense would no longer be available to him." Pet. Br. 25-26 (internal quotations omitted); see also *id.* at 26 ("[A] person cannot assert that he had the mental ability to appreciate the availability of a defense while simultaneously arguing that he lacked the mental capacity to form the intent required to support a murder conviction.")

But Michigan's claims ignore the reality that *both* prosecutors and criminal defendants rely upon the availability of particular defenses in developing trial strategies and negotiating plea agreements. And in expecting parties to prognosticate trends in decisional law—even to the point of ignoring binding intermediate appellate court precedent on a guess that the state supreme court might come out the other way, see Pet. Br. 19—Michigan also overlooks that busy prosecutors and defense counsel make decisions based on current law, not hazy predictions of where it might be in ten years. These are trial attorneys, not

Restatement writers. Thus, even if it "borders on the absurd" to suggest that criminal defendants weigh possible defenses before committing crimes, it is equally unlikely that prosecutors and defense counsel preparing for trial would ignore available defenses or somehow discount their importance because of some vague possibility that in the future a particular defense might be challenged as a matter of law.[2] *Cf. Rogers*, 532 U.S. at 464 ("Due process, of course, does not require a person to apprise himself of the common law of all 50 states in order to guarantee that his actions will not subject him to punishment in light of a developing trend in the law that has not yet made its way to his State.").

In the moment, counsel on both sides of the table must rely upon all available tools to convince one another that a particular disposition is appropriate or to persuade discerning jurors. If, in Michigan's world, a prosecutor were to warn defense counsel that: "you know, someday the diminished capacity defense might be overturned; I mean, look what's happened

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[2] Michigan's claim that it is "absurd" to argue that individuals order their conduct based on the availability of certain defenses also runs headlong into the legal presumption that all persons, especially criminal defendants, "know the law." *See Salazar* v. *Ramah Navajo Chapter*, 132 S. Ct. 2181, 2194 (2012) ("Ignorance of the law is no excuse."). Nor does it make sense to limit the reliance inquiry to the time of the alleged offense, because some defenses are not viable unless some event happens at trial. For example, this Court has held that a *Miranda* violation does not occur unless and until the prosecution attempts to introduce an unwarned confession at trial. *See United States* v. *Patane*, 542 U.S. 630, 641 (2004). Thus, a defendant's right to "fair warning" under *Rogers* obviously extends beyond his conduct at the time of the alleged offense: at the very least it runs through trial. Otherwise *Miranda* and other exclusionary-type defenses could be abolished without warning, and the abolition given retroactive effect.

in California," see Pet. Br. 23-24 (describing trend in California law), an entirely appropriate response for defense counsel would be: "Could be, but you have to worry what this jury is going to think of the evidence that we get to present." The oddity of such a conversation in the first place reflects just how far Michigan's world is from reality.

Further, in claiming that none of the due process concepts identified by the Court in *Rogers* are at play in this case, the upshot of Michigan's argument is that the retroactive application of the Michigan Supreme Court's decision in *Carpenter* is permissible *even if Carpenter* was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers*, 532 U.S. at 462. Under Michigan's unduly expansive construction of *Rogers*, the test is not whether a change in the law was foreseeable, but rather whether the particular defendant could have "relied" on that law in forming the intent for his alleged crime. Pet. Br. 25. ("It is also difficult to discern how Lancaster can argue that he lacked 'fair warning' of the possibility that he might not be able to assert a diminished-capacity defense if he killed someone. Such an argument assumes that Lancaster relied on the defense's existence when he murdered Toni King." (citations omitted)); see also *id.* at 26 ("The very nature of the defense (lack of mental capacity) precludes such reliance.").

Not only is that not the law, see *Bouie* v. *City of Columbia*, 378 U.S. 347, 355 n.5 (1964) ("The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants."), but it

would also destabilize the entire prosecutorial system by making retroactivity determinations turn on case-specific subjective intent. A given prosecutor or defense attorney could not be sure what law would ultimately apply in his case, because it would all depend on what was in the defendant's mind, not whether the change was foreseeable. (And in any event an attorney cannot plan for a change that is "unforeseeable.") This would in turn impair both sides' ability do their jobs, as defense attorneys and prosecutors alike must rely on the present state of the law to perform their duties.[3]

At the outset of a criminal prosecution, prosecutors rely on the present state of the law to select charges to pursue against the defendant. According to the United States Attorneys' Manual, for example, "the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction." U.S. Attorneys' Manual, Tit. 9, Ch. 9-27.300.[4] The selection of charges may be complicated where the defendant's conduct is prosecutable under different statutes with different proof requirements. *Id.* For example, in Michigan, there are four degrees of criminal child abuse. Mich. Comp. Laws § 750.136b. To determine whether an individu-

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[3] *Amicus* acknowledges that a decision of a state supreme court resolving an active split among panels of lower courts in the state would not necessarily violate a defendant's due process right to fair warning. *Amicus* deals here with a situation where the change in substantive law is unforeseeable and unexpected in light of existing, unified precedent.

[4] The Manual, of course, applies only to United States Attorneys and their Assistants, but it is illustrative of how prosecutors make decisions in state courts as well.

al should be charged with first degree child abuse, which encompasses "knowingly or intentionally" causing "serious physical or serious mental harm to a child," *id.* § 750.136b(2), or with a lesser crime, a prosecutor must assess the available defenses.

If, for example, it is likely that a defendant might be able to negate the specific intent element of first degree child abuse because there is significant evidence of diminished capacity, then a first degree child abuse charge is not "likely to result in a sustainable conviction" and the prosecutor should pursue a charge of a lesser degree. See, *e.g.*, *id.*§ 750.136b(3)(a) (a person is guilty of second degree child abuse if the person's "reckless act" causes serious harm to a child). But if the diminished capacity defense is not available to the defendant, the prosecutor should proceed on a first degree child abuse charge. Petitioner's formulation of *Rogers* introduces pervasive uncertainty into the prosecutor's decision-making calculus, because the substantive law upon which the prosecutor considers charges is vulnerable to retroactive amendment.

Prosecutors will be forced to grapple with similar uncertainties in the context of plea negotiations. As stated in the United States Attorney's Manual, before engaging in plea discussions, a prosecutor should evaluate the likelihood of conviction at trial. U.S. Attorneys' Manual, Tit. 9, Ch. 9-27.420. "[T]he prosecutor should weigh the strength of the government's case relative to the anticipated defense case." *Id.* But it is not feasible for a prosecutor to evaluate the likelihood of conviction at trial without knowing whether the diminished capacity defense (or other defenses susceptible to challenge under Michigan's transmogrification of *Rogers*) is available to the defendant. If the prosecutor does proceed with plea negotiations,

the Attorneys' Manual instructs him to require the defendant to plead to the charge "[t]hat is the most serious readily provable charge consistent with the nature and extent of his/her criminal conduct." *Id.* at Ch. 9-27.430. Because the provability of a charge is inextricably linked to the availability of defenses, this instruction is entirely unhelpful in the face of retroactive amendments. Likewise, a defendant cannot differentiate between a favorable and an unfavorable plea deal if he cannot rely on the present state of the law to evaluate his legal position.

In Michigan's world, instability and uncertainty would only increase if the parties could not reach an agreement. In preparing for and participating in a trial, prosecutors and defense counsel are not going to treat one available defense differently than another on the basis of some suspicion that one defense might someday be retroactively overturned and become unavailable on retrial. Many defenses require substantial investigative resources to prove; for example, diminished capacity typically requires hiring expert witnesses to evaluate the defendant's mental state and then explain it to the jury. The prosecutor in turn may present a counter-expert and adduce his own evidence through investigation in order to rebut the anticipated defense.[5]

Michigan seems to think both sides are going to ratchet up or down their efforts depending on how stable they think the law on a particular subject is. But that is not the way trials work, and it is certainly not how defense counsel think. The defense is aiming for an acquittal—or at least for a conviction on a less-

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[5] Trial judges, too, rely on the stability of substantive law, for instance when ruling on issues like the admissibility of evidence or the wording of jury instructions.

er charge—and if it succeeds, the state of the law ten years hence is irrelevant. Neither side is going to calibrate its efforts to fit hypothetical future holdings. Expanding *Rogers* the way Michigan suggests will thus only result in more blindsiding, more confusion, and more instability.

The states *amici* also ignore the fact that defendants rely upon substantive law past the time of the commission of an offense, in plea negotiations and trial preparations, and that defendants should be entitled to notice under the due process clause as a result of that reliance. See Br. of States as *Amici Curiae* in Support of Pet. 8 ("A person with mental capacity so diminished that he cannot premeditate the murder he commits could not possibly benefit from notice that his condition is not a defense."). On the flawed premise that the due process right to fair warning protects defendants only at the time of the offense (and not through trial), the states conclude that defenses "predicated on a lack of awareness of some sort" may be retroactively eliminated. *Id.* at 7. Accordingly, the states contend that a criminal defendant has no due process right to fair notice of the abolition of the defenses of insanity, factual ignorance or mistake, assisting an unlawful arrest, and entrapment. See *Id.* at 6-7.

The states' proposed "lack of awareness" standard, however, sweeps far broader than they admit, and would in fact eliminate a defendant's due process right to fair warning with respect to a large number of defenses. The awareness defenses the states identify attack the mens rea element of a crime and, in that sense at least, are indistinguishable from other mens rea defenses such as coercion, duress, withdrawal, and good faith. Mens rea is an element of most common law and statutory crimes. See *People* v. *Lardie*,

551 N.W.2d 656, 660 (Mich. 1996), *overruled on other grounds by People* v. *Schaefer*, 703 N.W.2d 774 (Mich. 2005) ("Criminal intent is ordinarily an element of a crime even where the crime is created by statute. Statutes that create strict liability for all of their elements are not favored." (internal citations omitted)).

Consequently, it is unsurprising that a substantial number of defenses exist to rebut mens rea. In fact, a defense counsel who does not raise a mens rea defense where the facts support one is vulnerable to an ineffective assistance of counsel attack. See *People* v. *Griffin*, 444 N.W.2d 139, 140 (Mich. 1989) (remanding for a hearing on defendant's claim that his counsel was ineffective for failure to explore the diminished capacity defense). By inviting prosecutorial challenges to, and the retroactive elimination of, mens rea defenses, the states' "lack of awareness" standard will result in further destabilization of the present state of the law, to the detriment of prosecutors and defendants who must rely on the law in pressing charges, negotiating plea agreements, and preparing for trial.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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